21

40

CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS,

OF THE

STATE OF MISSOURI,

FROM MARCH 18, 1890, TO APRIL 29, 1890.

REPORTED BY

DAVID GOLDSMITH, of the St. Louis Bar,

AND

BEN ELI GUTHRIE, of the Macon City Bar,

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JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. RODERICK E. ROMBAUER, *Presiding Judge.*
HON. SEYMOUR D. THOMPSON, }
HON. WILLIAM H. BIGGS, } *Judges.*

JOHN LEWIS, *Clerk.*
DAVID GOLDSMITH, *Reporter.*

JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

HON. J. L. SMITH, *Presiding Judge.*
HON. JAMES ELLISON, }
HON. T. A. GILL, } *Judges.*

L. F. MCCOY, *Clerk,*
BEN ELI GUTHRIE, *Reporter.*

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TABLE OF CASES DETERMINED.

A

Aldridge v. Spears........... 527
Anderson, Clifton v........... 614
Andrews, Jacquemin & Shenker v........................ 507
Ashbrook, State ex rel. v.... 64
Atkins, State v.............. 344

B

Babb v. Curators State University of Missouri......... 178
Bakewell, Nearen v.......... 625
Balsley, Dyer v.............. 559
Banks v. Wabash Western Ry. Co.......................... 458
Beck v. Dowell.............. 71
Beiler v. Devoll.............. 251
Bensberg v. Turk............ 227
Blakemore, State ex rel. v.... 406
Blanke v. Eggman.......... 318
Block, Sessions v............ 569
Boettger, Huels v............ 310
Boteler, Roy v.............. 218
Boteler v. Roy............... 234
Bowerman, State ex rel. v... 576
Brinkman, State v........... 284
Burkemper, Hayden v. 346

C

Cabanne, Marshall v........ 38
Cairns, Town of Kirkwood v. 631
Cape Girardeau & S. Ry. Co., Sanford v................. 15
Cantwell, Lally v............ 44
Campbell, Lippman v......... 564
Cauthorn, State ex rel. v...... 94
Chicago, M. & St. P. Ry. Co., Price v.................... 189
Chicago, S. F. & C. Ry. Co., McKinley v................ 449
Christian, Sawyer v......... 295
City of Springfield v. Ford... 586
Clark, Davis v.. 515
Clements v. Greenwell. 589
Clifton v. Anderson.......... 614
Conover v. Pacific Express Co. 81
Cooper v. Standley........... 188
Coquard, Pres't Mining & Milling Co. v................. 40
Corwin, Saulsbury v.......... 378
Couch & Franks, State v...... 325
Crowder, State ex rel. v...... 536
Curators, State University of Missouri, Babb v.......... 178

D

Davis v. Clark................ 515
Devoll, Beiler v.............. 251
Dimmitt v. H. & St. J. Ry. Co......................... 654
Donnell Mfg. Co. v. Hart.... 512
Dowell, Beck v............... 71
Drayage Co., Walsh v........ 389
Dyer v. Balsley.............. 559

E

Eggman v. Blanke........... 318
Ells v. Mo. Pac. Ry. Co...... 165
Everett, Potter v............ 152

F

Fallon, Lucas v.............. 551
Finks, Monroe City Bank v... 367
Ford, City of Springfield v... 586
Ford v. O'Donnell............ 51
Fox, Martin v................ 664

G

Garton, Third Nat. Bank of Sedalia v.................... 113
George v. Wabash Western Ry. Co.................. 483
German Ins. Co., Grigsby v.. 276
Gibbons v. Mo. Pac. Ry. Co. 146
Gibson, Warren v............ 469
Glaser Bros., Mechanics & Traders Bank v............ 371
Graham v. Morstadt......... 338
Greenwell, Clements v....... 589
Grigsby v. German Ins. Co... 276

H

Hannibal & St. J. Ry. Co., Dimmitt v. 654
Harris v. Mo. Pac. Ry. Co. 255
Hart, Donnell Mfg. Co. v. 512
Hatfield, State v. 358
Hattan v. Nevada Mining Co. 448
Hawkins, Koch v. 680
Hayden v. Burkemper 346
Hebel, Koch v. 241
Heege, State ex rel. v. 650
Heffernan v. Supreme Council Amer. Legion of Honor. 605
Hess v. Mo. Pac. Ry. Co. 202
Honeycutt v. St. L., I. M. & S. Ry. Co. 674
Hopkins, Malone v. 331
Howell, Null v. 329
Holladay, Treice v. 575
Huels v. Boettger 310

I

Implement Co. v. Leonard 477
In re Big Hollow Road 363
In re Final Settlement of Tyler 378
In re Green 491

J

Jacobs, Meyberg v. 128
Jacquemin & Shenker v. Andrews 507
Jeffries, Land Co. v. 360
Jones, Pitcher v. 583
Jones, Teasdale v. 243

K

Kansas City, Ft. S. & M. Ry. Co., Walton v. 544
Keithley v. Pittman 596
King, Munley v. 531
Kirkwood, Cairns v. 631
Kitchen, Williams v. 604
Kleinhoffer, LaFayette Building Ass'n v. 388
Koch v. Hawkins 680
Koch v. Hebel 241
Koch, State to use v. 635

L

LaFayette Building Ass'n v. Kleinhoffer 388
LaFayette County Bank v. Metcalf, Moore & Co. 496
Lally v. Cantwell 44
Land Co. v. Jeffries 360
Leitch v. Miller 180
Leonard, Implement Co. v. 477
Leonhard, Stotts v. 336
Lippman v. Campbell 564
Lowry v. St. Louis & H. Ry. Co. 554
Lucas v. Fallon 551
Lucas, Willi v. 70
Lux, Porth v. 162

M

MacDonald v. Wolff 302
Malone v. Hopkins 331
Marshall v. Cabanne 38
Martin v. Fox 664
McDaniel, State v. 356
McKinley v. Chicago, S. F. & C. Ry. Co. 449
Mechanics & Traders Bank v. Glaser Bros. 371
Metcalf, Moore & Co., LaFayette County Bank v. 494
Meyberg v. Jacobs 128
Meyer v. Stone 289
Miller, Leitch v. 180
Mohney v. Reed 99
Monroe City Bank v. Finks 367
Moore v. Thompson 195
Mo. Pac. Ry. Co., Ells v. 165
Mo. Pac. Ry. Co., Gibbons v. 146
Mo. Pac. Ry. Co., Harris v. 255
Mo. Pac. Ry. Co., Hess v. 202
Mo. Pac. Ry. Co., Thornton v. 265
Morstadt, Graham v. 333
Munley v. King 531

N

Nearen v. Bakewell 625
Nelson v. Sudiek 342
Nevada Mining Co., Hattan v. 448
Norton v. St. Louis & H. Ry. Co 642
Null v. Howell 329

O

O'Brien, Werner v. 483
O'Donnell, Ford v. 51

P

Pacific Express Co., Conover v. 31
Potter v. Everett 152
Pitcher v. Jones 583
Pittman, Keithley v. 596
Platte County Court, State ex rel. v. 503
Porth v. Lux 162
Pres't Mining & Milling Co. v Coquard 40
Price v. Chicago, M. & St. P. Ry. Co. 189
Price v. Vanstone 207

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Q

Quinn, State v. 573
Quinn, State v. 627

R

Reed, Mohney v. 99
Rosenthal v. St. Louis, I. M. & S. Ry. Co. 569
Roy, Boteler v. 234
Roy v. Boteler 213

S

Sanford v. Cape Girardeau & S. Ry. Co 15
Saulsbury v. Corwin 373
Sawyer v. Christian 295
Sessions v. Block 569
Smith v. Van Wyck 522
Spears, Aldridge v. 527
State ex rel. v. Ashbrook 64
State ex rel. v. Blakemore 406
State ex rel. v. Bowerman 576
State ex rel. v. Cauthorn 94
State ex rel. v. Crowder 536
State ex rel. v. Heege 650
State ex rel. v. Platte County Court 508
State to use v. Koch 635
State v. Atkins 344
State v. Brinkman 284
State v. Couch & Franks 325
State v. Hatfield 358
State v. McDaniel 356
State v. Quinn 573
State v. Quinn 627
State v. Tindall 271
State v. Umphrey 327
Standley, Cooper v. 138
St. Louis & H. Ry. Co., Lowry v. 554
St. Louis & H. Ry. Co., Norton v. 642
St. Louis, I. M. & S. Ry. Co., Honeycutt v. 674
St. Louis, I. M. & S. Ry. Co., Rosenthal v. 579
Stone, Meyer v. 289
Stotts v. Leonhard 336
Sudiek, Nelson v. 342
Supreme Council Amer. Legion of Honor, Heffernan v. 605

T

Teasdale v. Jones 243
Third National Bank of Sedalia v. Garton 118
Thompson, Moore v. 195
Thornton v. Mo. Pac. Ry. Co. 265
Tindall, State v. 271
Treice v. Holladay 575
Turk, Bensberg v. 227

U

Umphrey, State v. 327

V

Vanstone, Price v. 207
Van Wyck, Smith v. 522

W

Wabash Western Ry. Co., Banks v. 458
Wabash Western Ry. Co., George v. 433
Walsh v. Drayage Co 339
Walton v. Kansas City, Ft. S. & M. Ry. Co 544
Warren v. Gibson 469
Werner v. O'Brien 483
Williams v. Kitchen 604
Willi v. Lucas 70
Wolff, MacDonald v. 302

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TABLE OF CASES CITED.

A

Adams v. Raigner ... 399
Allen v. Mansfield ... 177
Alt v. Bank ... 638
Anderson v. McPike ... 27
Andrews v. Costican ... 158
Angell v. Hester ... 68

B

Baier v. Berberich ... 626
Bain v. Arnold ... 145
Baker v. Railroad ... 123
Bangert v. Bangert ... 146
Bank v. Gilstrap ... 43
Bank v. Hotel ... 109
Bank v. Hunt ... 68
Bank v. Jennings ... 431
Bank v. McMenamy ... 622
Bank v. Pulitzer ... 43
Barr v. Baker ... 481
Barnard v. Ins. Co ... 283
Basye v. Ambrose ... 228
Bateson v. Clark ... 369
Beedle v. Mead ... 68
Bergesh v. Kevil ... 126
Bethel v. Bailey ... 145
Black v. Landis ... 449
Boeline v. Murphy ... 526
Boggs v. Railroad ... 464, 559
Botts v. Carroll ... 526
Boyd v. Camp ... 111
Bradley v. Ins. Co. ... 282
Branson v. Turner ... 489
Bray v. Marshall ... 128
Bray v. McCluey ... 121
Breckenridge v. Ins. Co ... 206
Breeden v. Feurt ... 399
Briar v. Robertson ... 254
Brinkman v. Hunter ... 25
Broughton v. Brand ... 146
Brown v. Railroad ... 464
Brown v. Weldon ... 152, 482
Bunce v. Bick's Ex'r ... 525
Burnett v. McCluey ... 121, 126

C

Cahn v. Reid ... 186
Campbell v. Dent ... 431
Carson v. Cummings ... 195, 608
Casey v. State ... 574
Chouteau v. Allen ... 446
City of Kansas v. O'Connor ... 428
City of Kansas v. Street ... 152
Claflin v. Hoover ... 369
Clark v. Clark ... 145
Clark v. Fairley ... 84, 550
Clark v. Railroad ... 456
Clemens v. Maloney ... 82
Clowers v. Railroad ... 464
Compton v. Parsons ... 481
Conroy v. Iron Works ... 88
Cook v. Brown ... 171
Coudy v. Railroad ... 660
Coughlin v. Haeussler ... 399
Covey v. Railroad ... 465
Cox v. Dake ... 521
Cravens v. Jameson ... 62
Cruce v. Cruce ... 388
Crum v. Elliston ... 126, 363
Cummings v. Kohn ... 376
Cuomo v. St. Joseph ... 428

D

Dailey v. Houston ... 77
Daugherty v. Brown ... 475
Davis v. Hilton ... 177
Davis v. Land ... 638
Davis v. Smith ... 622
Deland v. Vanstone ... 158
Desberger v. Harrington ... 185
Devitt v. Railroad ... 264
Devlin v. Railroad ... 469
Dinsmore v. Livingston County, ... 222, 240
Dickson v. Railroad ... 444
Doan v. Railroad ... 86
Donnell v. Harshe ... 481
Douglass v. Cissna ... 144
Dowzelot v. Rawlins ... 27
Drake v. Jones ... 425
Dunn v. Miller ... 626
Durbin v. Fish ... 110
Dusky v. Rudder ... 499

E

Edwards v. Smit & Co ... 595
Elliott v. Abell ... 552
Ellis v. Railroad ... 263
Elsner v. Supreme Lodge ... 187
Estes v. Fry ... 188
Eyermann v. Cem. Ass'n ... 110

F

Farber v. Railroad ... 582
Feurth v. Anderson ... 608
Feurth v. Powell ... 501
Fields v. Mohey ... 123
Fisher v. Davis ... 98
Foster v. Dunklin ... 529
Foster v. Trimble ... 428, 449
Fuhr v. Dean ... 158
Fuller v. McClure ... 233

G

Gale v. Ins. Co ... 206
Gardner v. Ferry ... 623
Garrett v. Cramer ... 67
Gessler v. Railroad ... 263
Gibson v. Vaughn ... 97
Gibson v. Ziebig ... 648
Gill v. Ferriss ... 481

Digitized by Google

Gilliland v. Gilliland 146
Gives v. Van Studdiford 178
Glass v. Walker 282
Goins v. Railroad 469
Goodson v. Railroad 423
Gottschalk v. Klinger 333

H

Hammerslough v. Cheatham 171
Hardin v. Lee 123
Hargadine v. Van Horn 120
Harman v. Morris 562
Harrington v. Utterback 425, 623
Harvey v. Railroad 36
Hassam v. Barrett 641
Haysler v. Owens 112
Head v. Hargrave 152
Heath v. Railroad 444
Henderson v. Henderson 123
Henry v. Henry 171
Higgins v. Railroad 660
Hillegor v. Stephenson 40
Hippsley v. Railroad 645, 660
Hombs v. Corbin 242, 638
Holmes v. Board of Trade 43
Holmes v. Braidwood 135
Holt v. Dollarhide 601
Hoskins v. Railroad 206
Hotel Co. v. Sauer 43
Hulett v. Railroad 264
Hunter v. Chandler 411

I

Iba v. Railroad 97
In re Murphy and Spillane 492
Ins. Co. v. Floyd 43
Isaacs v. Skrainka 626
Ischer v. Bridge Co 465

J

Jefferson v. Cown 97
Johnson County v. Lowe 112
Johnson v. Houston 626
Jordan v. Bowman 233

K

Keber v. Bank 249
Keen v. Haymaker 481
Kinsey v. Springfield 449
Kirby v. Express Co 36
Kirkwood v. Autenreith 574
Knoop v. Distilling Company 562
Koenigkraemer v. Glass Co 50
Kohn v. Lucas 371
Kulage v. Schueler 638
Kuntz v. Temple 40

L

Lacy v. Williams 96
Lantz v. King 109
Lars v. Eisleben 386
Leeser v. Boeckhoff 562
Leisse v. Railroad 150
Lemon v. Chanslor 660
Lewis v. Railroad 78
Lightfoot v. Wilmot 152
Lionberger v. Baker 144

M

Malone v. Streth 686
Mansur v. Botts 24
Mansur v. Hill 317
Martin v. Jones 623
Martin v. State 274
Mason v. Black 425
McCune v. Belt 40
McDermott v. Railroad 464, 264
McEntire v. Darley 40
McElftarick v. Macauley 316
McFadden v. Railroad 87
McGarry v Railroad 678
McIlvaine v. Harris 160
McPike v. Pew 623
Meier v. Thieman 63, 396
Mfg. Co. v. Bean 367
Middleton v. Frame 125, 368
Middleton v. Railroad 62, 572
Miller v. Shoe Co 50
Milling Co. v. Ins. Co 283
Minor v. Edwards 111
Moise v. Colcher 449
Moore v. Railroad 264, 465
Morgan v. Durfee 84
Moss v. Railroad 442
Mulroy v. Knights of Honor 688
Munter v. Rande 49
Murphy v. Gay 481
Musgrove .v Mott 125

N

Nagle v. Railroad 464
Nanson v. Jacob 499
Neenan v. Donoghue 222
Nickey v, Railroad 36
Nichols v. Larkin 109
Norcross v. Hudson 62
Norman v. Horn 120
Norton v. Flake 125

O

Overbeck v. Galloway 529
Overholt v. Vieths 80
Owens v. Johns 121
Owens v. Railroad 25, 646

P

Parks v. Banks 622
Parsons v. Parsons 399
Patten v. Casey 144
Payne v. Weems 332
Phillips v. Ins. Co 283
Pier v. Heinrichoffen 109, 586
Pinney v. Berry 444
Polston v. Lee 82
Pond v. The People 90
Porter v. Railroad 469
Potter v. McDowell 144

R

Ragan v. McCoy 333
Railroad v. Truman 161
Railroad v. State Board 96
Railroad v. Young 419
Ray County v. Barr 685
Rice v. Railroad 206
Ridge v. Olmstead 603
Richardson v. George 369
Ring v. Jamison 63
Ring v. Kelly 396
Robertson v. Railroad 330
Roeder v. Studt 649
Rottman v. Fix 194
Russell v. DeFrance 683

S

Samuels v. State 238
Sanderson v. Holland 464
Schultz v. Moon 678

Digitized by Google

Schultz v. Railroad.......... 449
Scovill v. Glassner........ 608
Shackelford v. Brown................ 366
Shea v. Railroad..................... 492
Shepherd v. Railroad................ 646
Sherman v. Fleming............ 652
Shine v. Bank............ 526
Sibert v. Supreme Council........... 614
Sidekum v. Railroad.............. 646
Singer v. Goldenberg................ 135
Skaggs v. Given 649
Smith v. Benton 126
Smith v Crews... 300
Snoddy v. Pettis County.............. 98
Snodgrass v. Moore.................. 152
Soswell v. The Church............... 126
Spitler v. Young 653
Springer v. Kliensorge............... 625
Stanley v. Bircher................... 74
State ex rel. v. County Court 365, 652
State ex rel. v. Diveling............. 638
State ex rel. v. Emmerson............ 69
State ex rel. v. Heege................ 98
State ex rel. v. Hill.................. 652
State ex rel. v. Kansas City..... 96
State ex rel. v. Lyon.... 125
State ex rel. v. Marshall.. 652
State ex rel. v. Powers 96
State ex rel. v. Smith 652
State ex rel. v. Wear................. 410
State v. Barr......................... 358
State v. Braum....... 346
State v. Court of Appeals.... 390
State v. Clark........................ 274
State v. Davis.... 286
State v. Dunn........................ 630
State v. Fare......................... 358
State v. Forsythe..................... 649
State v. Fuchs 289
State v. Grady 630
State v. Greenup.................... 286
State v. Lipscomb 522
State v. Orahood... 152
State v. Railroad..................... 492
State v. Robinson..................... 630
State v. Roehm 346
State v. Williamson 346
State v. Teidman 624
Stephens v. Railroad.... 78
Stewart v. Cabanne.................. 363
Stewart v. Supreme Council.......... 614
Stilwell v. Hamm..... 223
Stillwell v. How.................... 40
St. Joseph v. Davenport.... 96
St. Louis v. Foster.................... 653
St. Louis v. Knox........... 588
St. Louis v. Gas Co.................. 247
St. Louis County v. Lind............ 96
St. Louis v. Ruland....... 652
St. Louis v. Smith............. 588
Storrs v. State....................... 346
Stotesberry v. Kirtland.......... ... 638
Stout v. Tribune Co............. .24, 222
Strauss v. Ayres 62
Strawbridge v. Clark............... . 201
Strong v. Ins. Co.................... 61
Southgate v. Railroad............... 48
Sutherland v. Holmes 476
Sumner v. Rodges.................... 195

T

Tetherow v. County Court.......... 529
Tevis v. Hughes 125
Thompson v. Railroad............... 282
Thompson v. School Dist.. 48
Trail v. Somerville................. . 67
Trorlicht v. Weizenecker...... 344
Tucker v. Railroad. 582
Turner v. Miller....... 222
Turner v. Railroad.................... 444

U

Ullman v. Railroad 456

V

Vierling v. Stifel 288
Vogeler v. Montgomery..........623, 638
Voss v. McGuire 489

W

Walter v. McSherry.................. 558
Wangler v. Franklin 61
Wayland v. Railroad 444
Webb v. Bidwell...................... 110
Whitehead v. Stoddard County 580
Whittey v. Platte County............. 97
Wigley v. Beauchamp.... 388
Williamson v. Fisher 456
Windsor v. Bank 508
Winters v. Railroad 52
Wise v. Wimer........................ 62
Wolfe v. Howes 110

Y

Yeates v. Ballentine.......... 112, 222 240

Z

Zimmerman v. Snowden. 97

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TABLE OF STATUTES CITED, CONSTRUED, ETC.

Administration, R. S. 1879, secs. 96, 97 ... 74
Attachment, R. S. 1889, sec. 588 ... 128
Attachment, R. S. 1889, sec. 570 ... 370

Clerks of Court of Record, R. S. 1879, sec. 614 ... 412
Clerks of Court of Record, R. S. 1879, sec. 630 ... 415
Code of Civil Procedure, R. S. 1889, sec. 2178 ... 630
Code of Civil Procedure, R. S. 1889, secs. 2252, 2253 ... 682
Code of Civil Procedure, R. S. 1889, sec. 2301 ... 518
Corporations, R. S. 1879, sec. 744 ... 42
Corporations, R. S. 1879, sec. 809 ... 558
Costs in Civil Cases, R. S. 1879, sec. 1016 ... 68
Costs in Civil Case, R. S. 1879, sec. 1005 ... 492
Costs in Civil Cases, R. S. 1879, sec. 1000 ... 585
Courts of Record, R. S. 1879, secs. 1102, 1210 ... 529
Courts of Record, R. S. 1879, sec. 1215. ... 326
Courts of Record, Laws 1883, p. 73 ... 326
Crimes and Criminal Procedure, R. S. 1879, sec. 1259 ... 505
Crimes and Criminal Procedure, R. S. 1879, secs. 2093, 2095, ... 506
Crimes and Criminal Procedure, R. S. 1879, secs. 2096-98-99, 2100-1 ... 507
Crimes and Criminal Procedure, R. S. 1879, sec. 1278 ... 285
Crimes and Criminal Procedure, R. S. 1879, sec. 1528 ... 357
Crimes and Criminal Procedure, R. S. 1879, sec. 1443 ... 357
Crimes and Criminal Procedure, R. S. 1879, sec. 2117 ... 651
Crimes and Criminal Procedure, R. S. 1879, secs. 2108, 2110, 2111 ... 651
Crimes and Punishments, R. S. 1889, sec. 3785 ... 357

Dramshops, R. S. 1889, sec. 4596 ... 97

Execution, R. S. 1879, sec. 2366 ... 157
Executions, R. S. 1879, sec. 2367 ... 157, 666
Ejectment, R. S. 1879, sec. 2259 ... 682
Ejectment, R. S. 1879, sec. 2260 ... 683

Fees, R. S. 1879, sec. 5595 ... 69
Frauds and Perjuries, R. S. 1879, sec. 2518 ... 391
Fraudulent Conveyances, R. S. 1879, sec. 2505 ... 560
Forcible Entry and Detainer, R. S. 1879, sec. 2486 ... 553
Forcible Entry and Detainer, R. S. 1879, sec. 2488 ... 553

Garnishments, R. S. sec. 2531 ... 372
Garnishments, R. S. 1879, sec. 2520 ... 603
Guardians and Curators, R. S. 1879, sec. 2578 ... 385

Injunctions, R. S. 1889, sec. 5500 ... 247

Judgments, R. S. 1879, sec. 2751 ... 68
Justices' Courts, R. S. 1879, sec. 3055 ... 232
Justices' Courts, R. S. 1879, sec. 6168. ... 332
Justices' Courts, R. S. 1879, sec. 3039 ... 366
Justices' Courts, R. S. 1879, sec. 2898. ... 582
Justices' Courts, R. S. 1879, sec. 3060. ... 596

Landlord and Tenant, R. S. 1879, sec. 3077 ... 255
Landlord and Tenant, R. S. 1879, sec. 3107 ... 521

Married Women, R. S. 1879, sec. 3296 ... 145
Married Women, R. S. 1889, sec. 6869. ... 376

Officers, R. S. 1879, sec. 3337 ... 415

Practice in Civil Cases, R. S. 1879, sec. 3465 ... 60
Practice in Civil Cases, R. S. 1879, sec. 3553 ... 75
Practice in Civil Cases, R. S. 1879, sec. 3594 ... 109
Practice in Civil Cases, R. S. 1879, sec. 3551 ... 223
Practice and Procedure, R. S. 1889, sec. 4927 ... 357

Township Organization, R. S. 1889, sec. 8547 ... 475

Witnesses, R. S. 1879, sec. 4010 ... 398

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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1890.

LINUS SANFORD, Ex'r, etc., of JOHN ALBERT, Deceased, Respondent, v. CAPE GIRARDEAU AND SOUTHWESTERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, March 18, 1890.

Quantum Meruit. In an action of *quantum meruit* for services rendered, a recovery is not warranted in the absence of evidence either of the reasonable value of the services or of a special contract fixing the rate of compensation. The evidence in this cause considered, and *held* by a majority of the court not to support the verdict.

Appeal from Cape Girardeau Court of Common Pleas. HON. MAURICE CRAMER, Judge.

REVERSED (*nisi; Judge Biggs dissenting*).

Wilson & Whitelaw, for the appellant.

Linus Sanford, *pro se*.

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THOMPSON, J., delivered the opinion of the court.

The petition contains what purports to be two counts. The first count is on a *quantum meruit*, to recover for the value of services rendered by the plaintiff's testator, at the special instance and request of the defendant, in procuring donations of money and lands to aid in the construction of the defendant's railroad, and also in circulating petitions among the citizens of Stoddard county, and thereby inducing the county court of Stoddard county to consent to a conveyance by the Cape Girardeau and Bloomfield Gravel and Macadamized Road Company to the defendant of eleven thousand, six hundred and twenty-nine acres of land, which the county court had donated to the gravel road company. The second count was drawn on the idea of stating a cause of action on a special contract, but it fails to state any such cause of action. It recites that on the twenty-eighth of April, 1881, the plaintiff (meaning, no doubt, the plaintiff's testator) submitted to the defendant a proposition in writing, therewith filed and marked Exhibit A., which proposition the defendant then and there accepted, and authorized *this plaintiff* to commence work under such contract. It then sets out the rendition of the services as they are set out in the preceding count, and concludes as follows: "That this defendant has failed, neglected and refused to pay this plaintiff ten per cent. of the subscription thus obtained, or any other sum; that the subscriptions obtained, as herein set out, are reasonably worth the sum of twenty-five hundred dollars, and that the plaintiff's commissions on said sum in accordance with his agreement would be the sum of twenty-five hundred dollars, and for which amount, with costs of suit, he asks judgment." This second count nowhere states, except inferentially as last quoted, that the defendant agreed to pay the plaintiff a commission of ten per cent. on the

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money and lands which he should procure to be donated to the defendant. The most that can be said for this second count is that it might possibly stand as a count for the reasonable value of the services therein described. The answer was a general denial and a plea of the statute of limitations. The defense of the statute of limitations may be laid out of view, because it does not form the subject of an assignment of error. The plaintiff recovered a verdict and judgment, and the defendant prosecutes this appeal, and assigns several errors, among which are a want of evidence to sustain the verdict.

There was no evidence of the reasonable value of the services, except so far as they were fixed by the terms of a special contract, which no doubt was the contract which the plaintiff intended to plead in the second count of the petition. The only evidence of this contract was furnished by an extract from the defendant's answer in the former action between the same parties upon the same subject-matter. That answer recites that the contract under which, if at all, the plaintiff is entitled to recover, was "a certain contract made and entered into by and between John Albert and this defendant on or about the twenty-ninth day of April, 1881, by which it was contracted and agreed that the said Albert was to engage in soliciting subscriptions for the purpose of the extension of defendant's road from Delta to Lakeville in Stoddard county, Missouri, and to do such other matters pertaining thereto to the best of his ability, and for the interest of the road, for a commission of ten per centum on all subscriptions made or obtained by him, to be paid on the delivery of the subscription notes and title bonds of realty, by note or notes from defendant," etc. As to the amount of services performed by the plaintiff's testator under this contract, the answer admits that he procured donations of money and land to the amount of eight hundred and

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fifty dollars, upon which he was entitled to a commission of ten per cent.; it also recites that he presented to the defendant his account, for the sum of eighty-eight dollars and twenty-five cents for his traveling expenses, and that the defendant paid him seventy dollars on account thereof, leaving a balance of eighteen dollars and twenty-five cents which the defendant is ready and willing to pay. The testimony of Mr. Wheeler, the defendant's secretary, who had charge of the defendant's records, was to the effect that all the money which the defendant ever collected on notes procured by the plaintiff's testator amounted to six hundred and seventy-one dollars. His statement of the expense account was, however, exactly as stated in the defendant's answer, in the former suit. We take it that the plaintiff was entitled to recover, on any theory, the amount due him as solemnly admitted by the defendant in its answer in the former suit, no payments having been either pleaded or proved; and we must, therefore, hold that the plaintiff was entitled to a judgment in the sum of one hundred and three dollars and twenty-five cents under the undisputed evidence.

But the judgment, which the plaintiff recovered, amounted to the sum of twelve hundred and seventy-four dollars and ninety cents, and the great excess over the amount, which the undisputed evidence shows to be due, is to be accounted for on the assumption that the jury found that, under the contract which the plaintiff attempted to plead in the second count of his petition, and which he proved by the quotation from the defendant's answer in the former suit above given, he rendered services to the defendant of the difference in value between what was undoubtedly due him, as above stated, and what the jury found, in procuring for defendant a conveyance by the gravel road company of eleven thousand, six hundred and twenty-nine acres of land, as stated in both counts of his petition. We

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are unable to find substantial evidence in the record to support such a finding.

It appears that there was a company called the Cape Girardeau and Bloomfield Gravel and Macadamized Road Company, to which the county court of Stoddard county had donated twenty thousand acres of swamp lands. It also appears from the plaintiff's petition that the county court of Stoddard county had subscribed for eight thousand shares of the capital stock of this gravel road company. It is then shown that on July 5, 1881, the county court of Stoddard county made the following order of record: "Ordered by the court, that, whereas application has been made by the Cape Girardeau Railroad Company to the county court of Stoddard county, Missouri, requesting that it should relinquish all its claim and interest of whatsoever nature to the Cape Girardeau and Bloomfield Macadamized and Gravel Road Company, so that said gravel road company may be enabled to grant the remaining portion of about twenty thousand acres of land donated by this county to said gravel road company, amounting to about thirteen thousand acres, said gravel road company agreeing, in lieu of said relinquishment, to quitclaim the bridge across Castor river and all other interest they may have in Stoddard county, Missouri, to said county, and they further agree to convey said land to said railroad company above named, so as to enable it to build the same to Lakeville, in Stoddard county; and it being further agreed that the said conveyance by said county is to be made by her trustee, and not to go into force or become valid or binding until said railroad shall have reached Lakeville,—it is, therefore, ordered by the court, that, if a majority of the taxpayers shall petition this court to so relinquish her said interest aforesaid, by the next regular term of this court, the same will be so ordered by this court." It should be stated that the Cape Girardeau Railroad Company,

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mentioned in this order, was the same company as the present defendant, there having been a change of name.

This order of the county court of Stoddard county implies, from its very terms, that negotiations leading up to it had taken place between three persons; the gravel road company, the railroad company and the county court. It may be imagined that some consideration moved from the railroad company to the gravel road company to secure the relinquishment by it of such a great quantity of land, but what this consideration, if any, was, does not appear. But it does appear from the order that a new and distinct consideration moved from the railway company to the county court, to induce the county court's assent to the arrangement, which consideration was that the railroad company should not acquire title to the lands until its railway should have reached the town of Lakeville. It, therefore, undertook, in order to procure such title, to build its road to that point. There is no evidence whatever that the plaintiff's testator had anything to do with any negotiations leading up to this arrangement. All that he did was to circulate petitions throughout the county, whereby the taxpayers petitioned the county court to make the final order, which the court proposed to make by the above order, in case a majority of the taxpayers should petition therefor, and also to present these petitions to the county court. Even if we could suppose that services of this extraordinary nature were intended by the parties, when they made the contract of April 29, 1881, as recited in the paragraph from the answer in the former suit above quoted, to be covered thereby, yet there is here an entire failure of evidence tending to show that the plaintiff's testator did any more than *assist* in consummating the arrangement, by procuring the assent of a majority of the taxpayers, after it had been fully agreed upon. But the evidence also tends to show that *others* assisted in circulating

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these petitions; that a mass meeting was held, at which Mr. Houck, president of the railroad, made a speech, and that several petitions were circulated at the mass meeting. It also tends to show that the inhabitants of the county were favorable to the arrangement, because they wanted to get the railroad. In short, the evidence leaves no room to doubt that, when the county court had come to the conclusion to yield its assent to the arrangement, upon condition of the railroad being built as far as Lakeville, the rest was a very easy matter. Giving the evidence in favor of the plaintiff the fullest effect, it does not, in the opinion of a majority of the court, tend to show that he procured the donation of this land by the gravel road company, with the assent of the county court, to the railway company.

But, aside from this, recurring to the terms of the contract of April 29, as above recited from the answer of the defendant in the former suit, it does not appear that the procuring of this donation of land by the gravel road company with the assent of the county court was a service contemplated by the parties to that contract. There was no evidence whatever that the services of the plaintiff's testator, in circulating the petitions and in presenting them to the county court, were rendered *under that contract.* Nevertheless, the court, by an instruction, submitted it to the jury to find whether or not such was the fact. This also was error.

If the plaintiff had given evidence tending to show the *reasonable value* of the services rendered by him, in thus circulating the petitions and in presenting them to the county court, no doubt he would have recovered a much larger amount than the defendant by its answer in the former suit admitted to be due; but, as there was no such evidence, we must conclude that the plaintiff is entitled to a judgment for no more than one hundred and three dollars and twenty-five cents. He can retain his

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judgment to this extent, if he will remit the remainder within two weeks from the filing of this opinion; otherwise the judgment will be reversed and the cause remanded. Judge ROMBAUER concurs; Judge BIGGS dissents.

BIGGS, J., delivered the following dissenting opinion.

It may be that the expression of my individual opinion of the merits of this controversy will serve no good purpose, but my reading of the record is so radically different from that of the majority of the court, that I have concluded to give my impressions of the case.

The plaintiff's petition contained two counts, but it stated only one cause of action. The first count is in form as for a *quantum meruit*, and contains a detailed statement of work, alleged to have been performed by the deceased for the defendant, of the reasonable value of twenty-five hundred dollars. The sum and substance of the alleged cause of action, as therein stated, is that, in 1881, the defendant contemplated an extension of its railroad through a portion of Stoddard county, and had determined to make the extension, provided the company should receive sufficient aid or inducement from the county and its citizens; that the defendant then employed the deceased, who was well acquainted in the county, to solicit donations of money and land in aid of the contemplated extension; that under this employment the plaintiff's intestate in the months of May, June, July and August, 1881, obtained various donations of money and land from private citizens of the county, and that, through his efforts, the defendant secured the title to eleven thousand, six hundred and twenty-nine acres of land, formerly conveyed to the Cape Girardeau and Bloomfield Macadamized Road Company by Stoddard county in aid of the construction of an improved road, which the last-named company

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had undertaken to build, but had failed to complete according to its contract with the county; that the macadamized road company was willing to convey this land to the defendant, provided the county would surrender its stock in the road company, and would release it from the obligation to complete the improved road; that the county court declined to do this, unless the defendant would secure the signatures of a majority of the taxpayers of the county to a petition asking the court to take such action; that to accomplish this, the deceased, under his said employment, procured over twelve hundred taxpayers of the county to sign said petition, and that said county court in August, 1881, through the aforesaid efforts of the deceased, did by its order, entered of record, agree to surrender the stock of the county in the macadamized road company, and release the latter company from its obligation to complete its road, provided the land hereinbefore mentioned was conveyed by the macadamized road company to the defendant. The plaintiff then alleged that this large tract of land was afterwards conveyed to the defendant, and that it was of the reasonable value of one dollar and fifty cents per acre, and that the amount of private subscription obtained by the deceased was of the additional value of eight hundred and seventy-five dollars.

In the second count of the petition the plaintiff sues for the same services, and the right to recover is based on an alleged special contract, but the averments are so vague and indefinite, that it is impossible to say with certainty what the contract was. It is averred that the contract was in writing, and the statement is made that the contract is attached to the petition as an exhibit, but the petition fails to set out its terms. It appears inferentially, however, that the defendant was to pay the deceased ten per cent. of the value of all subscriptions, whether of land or money, which the deceased might obtain in Stoddard county.

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The defendant filed an answer denying the allegations in both counts, and, by way of an additional defense to the second count, the statute of limitations was pleaded.

It is evident from an inspection of the transcript in this case that it is imperfect. The clerk has failed to copy into the record the exhibit called for in the second count of plaintiff's petition, and he has omitted Exhibits "A" and "B," attached to papers in a former suit between the same parties and read in evidence by plaintiff.

Before I pass to the consideration of the errors assigned, I have thought it best to say something about the two counts in the petition. The defendant has assumed and urged that two separate causes of action are set forth. The pleading will not bear any such construction. The cause of action stated in each count is the same.

If there was a special contract between the deceased and the defendant, as alleged, and the contract had been fully performed, then it was competent for the plaintiff to either declare on the contract or to sue in *indebitatus assumpsit.* The plaintiff has deemed it necessary, for some reason, to state his cause of action both ways. This was unnecessary as it was competent under the first count for him to show that the work was done under a special contract and also what the terms and conditions of the contract were; and, if it appeared that the decedent had completed the work, then the rights of the parties would be adjudged according to its provisions and stipulations. *Mansur v. Botts*, 80 Mo. 651; *Stout v. Tribune Co.*, 52 Mo. 342.

As previously stated, the second count under the facts of this case was entirely superfluous, and was only calculated to bring confusion into the record. It brought about the objection by the defendant to the action of the court in refusing to compel the plaintiff to elect on which count he would rely; also the objection

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that the verdict of the jury was wrong, because it did not state upon which count the verdict was found; and, also, a motion by the defendant for judgment on the second count because it did not state facts sufficient to constitute a cause of action. The first two objections were properly overruled (*Owens v. Railroad*, 58 Mo. 386; *Brinkman v. Hunter*, 73 Mo. 172), and the ruling on the last could not have been prejudicial, for the reason that but one cause of action was stated in both counts; the plaintiff was entitled to but one recovery; and all evidence introduced by the plaintiff was properly admissible under the first count, the sufficiency of which was not questioned. I will, therefore, lay out of view the second count and all objections arising out of, and pertaining to, it.

On the part of the plaintiff, the court instructed the jury as follows: "The court instructs the jury that if they shall believe, from the evidence in this cause, that the defendant entered into a contract with John Albert, employing him to solicit subscriptions and donations of land and money to aid in the extension of defendant's road from Delta to Lakeville, in Stoddard county, and to do other work in that behalf, and agreed to pay him therefor a commission of ten per cent. on all subscriptions made or obtained by him, then, if you shall further find that the said Albert under such employment rendered defendant such services, his executor, the plaintiff herein, is entitled to recover in this cause, and your verdict should be for the plaintiff in such sum as, from the evidence, you shall believe to be proper, not exceeding ten per cent. on all sums collected by defendant on account of subscription notes taken by said Albert, and ten per cent. on the reasonable value of all lands obtained by defendant in consequence of the employment and labors of said Albert."

The defendant assigns for error the giving of this instruction, and it is challenged on the ground that there was no sufficient or competent evidence, either of

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the contract of employment, or of the performance of the work by the deceased, or of the value of the services claimed to have been rendered. The last objection is untenable, for the reason that the plaintiff's right to recover is made to depend upon the existence of a special contract, in which the plaintiff claimed that he was employed to do the work, and that his compensation therefor was fixed at ten per cent. of the value of all lands and money secured by him. Under this view, the reasonable value of the services became immaterial. Whenever it was disclosed by the evidence that there was a special contract for the work, that the compensation therefor had been agreed on, and the work fully performed, then the rights and liabilities of the parties depended upon, and had to be governed entirely by, the agreement. *Mansur v. Botts*, *supra.*

The proper disposition of the other objections presents a question of some difficulty, and the trouble is somewhat increased on account of the defects in the record hereinbefore referred to. The plaintiff, in declaring on the special contract, alleged that it was in writing, and that the contract was attached to the petition as an exhibit. The clerk failed to embody this paper in the record, and we are compelled to look to other portions of the record to ascertain its purport. The paper was identified by the secretary of the defendant corporation, and he designated it as a proposition submitted by the deceased to the defendant to do certain work in Stoddard county; but the witness said the proposition had never been accepted or acted on by the defendant's board of directors. We must conclude, then, that the special contract, if any existed, rested in parol. In proof of the existence of such a contract, the plaintiff read in evidence the answer of the defendant in another suit relating to the same subject-matter of litigation, in which the defendant admitted that on or about the twenty-ninth day of April, 1881, it entered

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into a contract with the deceased, by which he was employed to solicit subscriptions of money and land for the purpose of aiding in the extension of defendant's railroad from the town of Delta to Lakeville, in Stoddard county, and to do such other matters pertaining thereto to the best of his ability, and for the interest of the road, and that the defendant agreed to pay the deceased therefor ten per cent. on all subscriptions, to be paid on the delivery of subscription notes and title bonds for lands. The defendant objected to the admission of the pleading in evidence, but, under the rulings of the supreme court and this court, it was competent evidence against it as an admission. *Dowzelot v. Rawlings*, 58 Mo. 75; *Anderson v. McPike*, 86 Mo. 293.

A. J. Henson, one of the plaintiff's witnesses, testified: "In 1881, John Albert was canvassing Stoddard county, to get the citizens of Stoddard county to sign petitions to the county court of Stoddard county to give the gravel road land to the Cape Girardeau railroad, and trying to get the people to subscribe land and money to help build the Cape Girardeau railroad. * * * There was a public meeting at Piketon called about the railroad. John Albert was there. Mr. Houck was at the meeting, and made a speech urging the people to aid in building the railroad. Houck made a rattling good speech, and said Albert was there and would attend to business, take their subscriptions to aid in building the road, and get signatures to petitions. It was admitted that Mr. Houck was the general manager of the defendant corporation." The defendant's secretary also testified that the books of the defendant showed that a portion of the expenses incurred by deceased in soliciting aid for the railroad in Stoddard county had been paid by the company. This evidence, I think, furnishes substantial proof that there was a contract between the

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parties, and that the deceased was to receive as compensation a commission of ten per cent. on all money collected, and the same commission on the reasonable value of all lands secured through his efforts.

It is admitted by the defendant that the deceased did procure donations from some of the citizens of Stoddard county, and that this was done under the special contract of April 29, 1881. This is recognized by the opinion of the majority of the court; therefore, the real matter in dispute is, whether the work, done by the deceased in procuring the petitions and the subsequent order of the county court authorizing the transfer of the gravel road land to the defendant, was performed under the special contract of employment, or done under some other contract of employment. If there was substantial evidence that these services were rendered under the special contract, then the opinion of my associates is wrong.

In the first place I cannot agree that the conveyance of the gravel road land was other than a simple donation, made by Stoddard county in aid of the extension of defendant's road. The conditions attached to the conveyance, to-wit, that the extension should be made, would be exacted in any case, whether the donation was made by the county or an individual. I, therefore, conclude that the work performed by the deceased in procuring this conveyance was the kind of work contemplated by the special contract, and that this circumstance is favorable to the plaintiff's side of the case. The only outside evidence of the actual employment of the deceased to secure the donation of the gravel road lands is that of Judge Henson of the Stoddard county court. He states that, in 1881, Louis Houck and the deceased appeared before the county court, and stated that the gravel road company was willing to convey the land to the defendant, provided the county court would release the road company from the contract to complete

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its road; that he informed Mr. Houck that the court would not make such an order, unless it was authorized to do so by a majority of the taxpayers of the county; that, thereupon, Houck abandoned the project and returned to Cape Girardeau county. The witness then testified that, within one or two weeks thereafter, he wrote to Houck suggesting to him the propriety of employing Albert, who was well and favorably known in Stoddard county, to obtain the consent of the taxpayers to the release of the gravel road company from its contract, provided the swamp lands were conveyed to the defendant; that, within a week, Mr. Houck answered his letter, stating that he had employed the deceased as suggested; that shortly afterwards the deceased returned to Stoddard county, and that, through his efforts, the names of a majority of the taxpayers were secured to petitions, and the court thereupon made the order releasing the gravel road company, provided it would convey the swamp lands to the defendant. Henson does not fix the exact date of these transactions, and we are compelled to look to other portions of the record for information as to this particular fact. The first bill for expenses, incurred by deceased in connection with defendant's business in Stoddard county, was audited and paid by defendant on the sixteenth day of May, 1881, and this furnishes some evidence that the letter from Houck to Henson was written prior to that time. The plaintiff proved that the special contract was entered into on the twenty-ninth day of April, 1881, and, in the absence of any evidence of another and different contract, the jury was fully authorized in finding that the employment of April 29, 1881, had reference to the same contract of employment mentioned in Houck's letter to Henson. Houck knew that the donation of the land of the gravel road company could not be accomplished, unless some one, in whom the people had confidence, was employed to agitate the question and to

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work up a public sentiment in favor of the enterprise, and, therefore, it may be fairly inferred that this was the true reason or inducement for the admitted contract with deceased.

The record also fails to give the date of the Piketon meeting, at which Mr. Houck announced publicly that the deceased was present and would represent the railroad in securing aid for its extension into Stoddard county. So far as the record shows, this was the first appearance of the deceased in the county on that particular business, and this furnishes additional evidence that the employment of the deceased to procure the conveyance of the land of the gravel road company was prior to the sixteenth day of May, at which time the defendant paid the first bill of expense incurred by deceased; and it also furnished an additional reason for the conclusion arrived at by the jury, to the effect that the contract of April 29 was the only contract of employment; this was a fair inference in the absence of any testimony on the part of the defendant. If there were two contracts it was certainly within the power of defendant to show it. Wheeler, who was introduced as a witness by plaintiff, testified that he had been secretary of the road since its organization, and there was no intimation from him that there was more than one contract.

In the light of this evidence I have been unable to agree to the opinion in this case, and, therefore, dissent from the conclusion reached by my associates.

The instruction given was erroneous in one respect, but the error was favorable to the defendant. The instruction authorized the jury to find a less sum than ten per cent. of the value of the notes and lands secured by deceased. If the services sued for were rendered under the special contract, then his compensation was fixed, and the judgment should have been in accordance with the contract, regardless of the nature or value of the services.

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DAVID F. CONOVER *et al.*, Respondents, v. THE PACIFIC EXPRESS COMPANY, Appellant.

St. Louis Court of Appeals, March 18, 1890.

1. **Common Carriers:** LIMITATION OF LIABILITY. A common carrier cannot, by contract, limit the extent of his liability for his negligence. And a stipulation by the carrier that his liability should not exceed a stated sum, unless the value of the property should be disclosed, will not relieve the carrier from liability for the actual value of the property, in case of the loss thereof through his negligence in the carriage of it, though the shipper, on demand by the carrier, refused to state the amount of its value, and though a larger charge would have been made for its carriage and it would have been differently carried, than was done, if such value had been disclosed.

2. ——— : ——— : LIQUIDATED DAMAGES. But, *semble* that an agreement between the carrier and shipper fixing the value of the property, and liquidating the damages for the loss of the property at the value thus fixed, is valid, if made for a sufficient consideration.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Albert C. Davis and *William C. Marshall*, for the appellant.

The court erred in holding that the plaintiffs were not bound by the limitation regarding the amount of loss provided for by the receipt given by the defendant. It is competent for a common carrier, by the contract of carriage, to limit the amount of his liability in case of loss, and the rule is the same whether the loss was occasioned by the negligence of the carrier or

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not. *Brown v. Railroad*, 18 Mo. App. 568; *Harvey v. Railroad*, 74 Mo. 536; *Hart v. Railroad*, 112 U. S. 331; *Oppenheimer v. Express Co.*, 69 Ill. 62; *Railroad v. Weakley*, 50 Ark. 397; *Railroad v. Hanlien*, 56 Ala. 606. The court erred in not giving defendant's instruction that under the evidence the plaintiffs are estopped from claiming or asserting that the value of the package of jewelry sued for in this action is greater than fifty dollars. If the value of a package is concealed by silence, or if the value of a package is requested by the agent of the carrier of the shipper, and no answer, or a false answer, is given such agent, it is a fraud upon the carrier and the carrier is thereby released from all liability for the loss of the same. Lawson on Carriers, sec. 20; *Railroad v. Burk*, 9 Am. & Eng. R. R. Cas. 59; *Railroad v. Falhoff*, 100 U. S. 24; *Phillips v. Earl*, 8 Pick. 181; *Macklin v. Waterhouse*, 5 Bing. 212; *Baldwin v. Collins*, 2 Rob. 468; *Fascet v. Ruark*, 3 La. Ann. 664; *Louis v. Gale*, 17 La. Ann. 302; *Little v. Railroad*, 63 Me. 269; *Magnin v. Dinsmore*, 62 N. Y. 35; s. c., 70 N. Y. 410. And the plaintiffs, to recover the full value of the package, must establish that the package was stolen through the negligence of the defendant, and the absence of any fraud or misrepresentation as to the real value of the package. *Doan v. Railroad*, 38 Mo. App. 408; *McFadden v. Railroad*, 92 Mo. 343.

Chester H. Krum, for the respondents.

No rule is better settled in this state, than that while a carrier may limit his common-law liabilities, yet he cannot exempt himself from his negligence. *Snider v. Express Co.*, 63 Mo. 382; *Ball v. Railroad*, 83 Mo. 574; *Kirby v. Express Co.*, 2 Mo. App. 369; *Craycroft v. Railroad*, 18 Mo. App. 487. No rule is more clearly settled than that the fact of loss, unexplained, creates

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a conclusive presumption, that such loss was caused by the negligence of the carrier. *Kirby v. Express Co.*, 2 Mo. App. 369; *Davis v. Railroad*, 89 Mo. 340. The law controlling this case is correctly stated in *Kirby v. Express Co.*, *supra*, which stands unchallenged in this state. This case does not depend in the slightest degree upon the ruling in *Harvey v. Railroad*, 74 Mo. 536, and kindred cases, which are merely cases of limited liability as to amount, resulting from an express contract of carriage at a reduced rate of transportation. *McFadden v. Railroad*, 92 Mo. 343.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action brought by the plaintiffs to the use of the Union Insurance Company of Philadelphia, who paid to the plaintiffs, upon a contract of guarantee of safe delivery, the value of certain jewelry, which had been delivered by the plaintiffs to the defendant for safe carriage from Little Rock, Arkansas, to Philadelphia, Pennsylvania, and which was stolen from the defendant, while in transit. Upon trial of the cause by the court without a jury, the plaintiffs recovered judgment for two hundred and fifty-seven dollars and eighty cents.

No objection is made to the form of, or parties to, the action, nor as to the right of recovery, but the defendant claims that, under the conceded facts, the recovery should have been limited to fifty dollars with interest from the date of demand.

The cause was tried upon an agreed statement of facts, which is as follows: "On the twenty-ninth day of November, 1886, Ernest Spiering, acting for and representing David F. Conover & Co., a firm composed of David F. Conover and B. Frank Williams, delivered to the defendant at Little Rock, Arkansas, for carriage to and delivery at Philadelphia, Pennsylvania, the goods whose value is sued for in this action. These goods

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were the property of said Conover & Co., and were of the value of two hundred and twenty-six dollars and ninety-five cents.

"Upon the delivery of these goods to the defendant, it issued to said Spiering, for and in behalf of said Conover & Co., the receipt attached to the deposition for plaintiff herein (the written part of which, with the exception of the name of the agent, was in the handwriting of said Spiering), said receipt being hereby made part of this statement.

"Spiering was asked by the agent of the defendant at Little Rock what the value of the goods was, and declined to give it. The charges of the defendant for the carriage of the goods were not paid at the time of their delivery to the defendant, but were to be paid by the consignees on delivery of the goods to them at the point of their destination.

"Had the goods been safely delivered, the charges of the defendant, under the custom of its business, would have been based upon a valuation of fifty dollars. Had the value of the goods been given, the defendant would have charged more, upon the delivery of the goods, than it would have done under the receipt, as actually given to Conover & Co. Had the real value of the package been indicated, the defendant would have carried it in a safe provided for such purpose. The package was carried in the same manner as all other unvalued packages are carried by the defendant.

"The goods were not delivered to the consignees, or any one representing them, having been stolen from defendant while in transit.

"The goods were insured for the benefit of D. F Conover & Co., by the Union Insurance Company, of Philadelphia, by the policy accompanying this statement, and attached to said deposition of plaintiff, which is made part hereof. After the loss of the goods, the insurance company paid said Conover & Co. two hundred and twenty-six dollars and ninety-five cents, and

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took an assignment, also attached to said deposition and made part hereof."

No points arise upon the policy of insurance, referred to in the statement, and the only clause of the receipt forming part of the agreed facts, on which any point is made is as follows:

"It is hereby expressly agreed, that the Pacific Express Company are not to be held liable * * * for any loss or damage of any box, package or thing for over fifty dollars, unless the just and true value thereof is herein stated."

The answer does not charge, nor does the proof show, any fraudulent misrepresentation, or fraudulent suppression of facts, on part of Spiering, as to the value of such package; nor does the answer charge, or the proof show, that the plaintiffs, or their agent Spiering, were advised of the fact that the rates of defendant's charges were regulated according to the value of packages carried, nor that the plaintiff, or its agent, were aware of the fact, that valued packages were carried by the defendant in a different manner than unvalued packages.

It will be thus seen that the case presents these simple propositions: Can a common carrier in this state by contract limit his liability *in amount*, when the loss is caused by his own negligence, or can he, by contract between himself and the shipper, liquidate the damages at a sum certain in case of loss due to his own negligence? These propositions are akin, yet different in this, that a limitation of the carrier's liability is a provision solely in the carrier's favor, as the shipper in case of loss would still have to prove the value of the article to be equal to or greater than the amount limited, in order to recover the limit, whereas in a case of liquidated damages the amount agreed upon is conclusive on both parties.

That the carrier cannot limit his liability *in amount*, when the loss is due to his own negligence has been

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decided by this court at least on three occasions. *Kirby v. Express Company*, 2 Mo. App. 377; *Nickey v. Railroad*, 35 Mo. App. 86, 87; *Doan v. Railroad*, 38 Mo. App. 408. If these cases correctly express the law, there would seem to be no room for argument in this cause; as the judgment of the trial court, under the agreed facts, is strictly in conformity with them, and as the contract presents the feature of limitation as distinguished from liquidation of damages.

Since the decision in *Kirby v. Adams Express Co.*, *supra*, the second proposition hereinabove stated has twice come before the supreme court. In *Harvey v. Railroad*, 74 Mo. 538, the contract between the carrier and shipper related to the transportation of a horse, the contract stating that it was to be carried at owner's risk *and its value, if injured or killed, was one hundred dollars.* The answer claimed that the horse was carried as a valued horse, that its true value was not disclosed, and that the freight charges would have been greater for a horse of a greater value, and, therefore, claimed that the plaintiff's recovery was limited to one hundred dollars. The plaintiff gave evidence that the horse was of the value of six thousand dollars; the defendant gave evidence of the facts stated in its answer, and asked an instruction, telling the jury that, if they found such facts to be true, the plaintiff could not recover beyond one hundred dollars. The court refused the instruction; the supreme court reversed the case, holding that the instruction should have been given. Judge HOUGH, speaking for the court, said: "This court has repeatedly held that public policy will not permit a common carrier to contract for exemption from liability on account of the negligence of itself or its servants. The plaintiff contends that it is as much against the policy of the law to permit the carrier to limit its liability to a part of the loss, as it would be to permit it to stipulate against the entire loss. We do

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not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped, as a contract in any degree exempting the carrier from the consequence of its own negligence. Such a contract fairly entered into leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages. This we think it is competent for the carrier to do. And where the reduced value is voluntarily fixed by the shipper, with a view of obtaining a low rate of freight, without any knowledge on the part of the carrier that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than fixed by him. *Hart v. Railroad*, 7 Fed. Rep. 630; Lawson on Carriers, section 20." In the case of *McFadden v. Railroad*, 92 Mo. 343, the same question arose in a different form. There the stipulation in the contract was that the carrier should not be liable *for more than one hundred dollars* per head for the mules shipped. The answer was substantially the same as in the *Harvey case*, but the proof failed to show that the stock was agreed to be carried at a lower rate of freight on that account; on the contrary it appeared that the statement in the contract, that the rate was a reduced rate, was false. The recovery was for more than one hundred dollars per head and was upheld. Judge RAY, speaking for the court, said: "Under the circumstances of this case, there was, we think, no consideration for the limited valuation placed upon the mules by defendant, and the stipulation in that respect is, we think, void as releasing the carrier from the full and reasonably adequate liability for its negligence."

These two decisions seem to lead to the inference that in this state the carrier may contract with the shipper, upon a sufficient consideration supporting the restricted liability to the effect that his damages, in case

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of loss caused even by the carrier's own negligence, should be liquidated at a certain sum. This is the extent, we believe, to which these cases go. The *McFadden case* seems to intimate that a limit may under circumstances be treated as a liquidation. But both these cases fall short of relieving the defendant in the present case, because here there was no contract for a lower freight; it is not even shown that the plaintiffs or their agent knew what the freight charges were, as they did not pay them, and, as the loss was admittedly caused by the carrier's negligence, it was liable for the full value under all the decisions in this state.

As the case is one which, under the two decisions of the supreme court above quoted, presents fairly debatable features, the judgment will be affirmed without damages. So ordered. All the judges concur.

WILLIAM C. MARSHALL, Appellant, v. J. S. CABANNE, Defendant, AND VALLE REYBURN, Administrator of MORRISON, Respondent.

St. Louis Court of Appeals, March 18, 1890.

Bills and Notes. Proof that a note was negotiated by the maker of it is not sufficient to charge as a co-maker one, whose name appears on the back thereof after the name of the payee.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

William C. Marshall, *pro se*.

Virgil M. Harris, for the respondent.

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Rombauer, P. J., delivered the opinion of the court.

This suit is founded on a promissory note, a copy whereof is as follows:

"$500.00. St. Louis, Mo., May 5, 1888.

"Sixty days after date I promise to pay to the order of Susan P. Cabanne five hundred dollars, for value received, negotiable and payable without defalcation or discount, and with interest from maturity at the rate of ten per cent. per annum.

"J. S. Cabanne."

Indorsed on the back of the note in the order here given appear the signatures, Susan P. Cabanne, Jas. L. D. Morrison.

The petition states that Morrison is dead, and Reyburn is his administrator, and further states that Morrison, being neither the indorser nor payee of the note, for value received wrote his name upon the back of said note, and that J. S. Cabanne thereupon sold and delivered it for value, before maturity. The petition, upon this statement of facts, seeks to charge Cabanne and Morrison as joint makers of the note. The answer is a general denial.

Upon the trial before the court, the plaintiff proved that his assignor obtained the note for value, before maturity, from Cabanne, in the shape in which it at present appears. This testimony and the note were all the evidence offered by the plaintiff. The court thereupon declared the law to be that the plaintiff could not recover against the administrator of Morrison, and the plaintiff took a non-suit as to the administrator, and, after an ineffectual attempt to set it aside, brings the case here by appeal.

It will be thus seen that the simple question presented is whether, under the facts shown, Morrison became liable as a joint maker. It is well settled in this state that one who writes his name on the back of

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a note, of which he is neither the payee nor indorsee, becomes presumptively liable as a maker. But, as this court held in *McEntire v. Darley*, 15 Mo. App. 583, it is not the law that one becomes presumptively liable as a maker simply because he signs his name on the back of a note without explanation. It is elementary law affecting negotiable instruments that the liabilities of parties are determined, *prima facie*, by the order in which their signatures appear upon the note, both as between themselves and as to third parties. *McCune v. Belt*, 45 Mo. 174; *Stilwell v. How*, 46 Mo. 589; *Kuntz v. Temple*, 48 Mo. 71; *Hillegas v. Stephenson*, 75 Mo. 118. The legal presumption arising from the fact that this note was negotiated by the maker, and not by Morrison, is that the payee and Morrison indorsed it for the maker's accommodation, or, as some cases imply, that the note was surrendered to the maker after indorsement, but no presumption can possibly arise from that fact alone that Morrison intended to make, or did make, another contract than the one made by him in law, to-wit, that of an indorser, by signing his name on the back of the paper below the name of the payee.

All the judges concurring, the judgment is affirmed

THE PRESIDENT MINING AND MILLING COMPANY Respondent, v. L. A. COQUARD, Appellant.

St. Louis Court of Appeals, March 18, 1890.

1. **Corporations.** The insolvency of a corporation, and its discontinuance of the business for which it was organized, does not deprive it of the power of collecting and enforcing in its own name claims due to it.

2. ——— : EMPLOYMENT OF ATTORNEY. An attorney may be employed by a corporation to prosecute a suit in its behalf without a formal resolution of its board of directors, authorizing such employment.

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3. **Practice, Appellate.** A demand for an affirmance with damages *held* warranted on the ground that every proposition urged by the appellant had been determined adversely to him by prior decisions of the supreme court and this court.

Appeal from the St. Louis City Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Jos. S. Laurie, for the appellant.

Lee & Ellis, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiff brought this action to recover a balance in the hands of the defendant, admitted to be due. The only defense now sought to be sustained arises on the following part of the answer: "Further answering defendant says said company on the —— day of ——, 1888, sold and transferred to another corporation, the Quintette Mining Company, all its property and assets, including the present claim, and that plaintiff has, therefore, no right or interest in the same, and defendant further says that since the date of the aforesaid transfer this plaintiff, being insolvent, discontinued all business, and ceased to exist as a business or mining corporation, and defendant further states that this suit is brought without the authority of plaintiff as a corporation."

Upon the trial the defendant gave evidence tending to show the following facts: The plaintiff was a Colorado corporation, organized for the purpose of mining and business incidental to it, and all its mining claims were sold out under a deed of trust prior to the institution of this suit. The asset sued for was never transferred, but was, with some tangible property, presumably of some slight value, still the property of the

corporation. The last meeting of the stockholders of the corporation was held in November, 1888, at which directors were elected, and this suit was instituted with the knowledge and by the authority of the directors, but whether such authority was evidenced by resolution of the board or not, did not appear. The defendant asked the president of the corporation, whom he called as his witness, whether the company had made any attempts to resume its business, or intended to do so, and what the value of the tangible property owned by the corporation was, which questions were ruled out by the court as calling for irrelevant evidence.

The defendant also offered in evidence part of the general corporation laws of the state of Colorado, providing that, "upon dissolution by expiration of its charter or otherwise" of any corporation, the directors shall become trustees for winding up the corporate affairs. The provision is substantially the same as contained in section 744 of our Revised Statutes of 1879, which was the law of this state when the cases hereinafter referred to were decided. Our statute merely uses the words, "upon the dissolution of any corporation," and the Colorado statute adds, "by the expiration of its charter or otherwise." As the term dissolution of a corporation necessarily includes its dissolution in any manner known to the law, there is no substantial difference between the Missouri and Colorado statute on the subject.

The trial court upon this evidence rendered judgment in favor of the plaintiff, and the errors assigned are that the court erred in ruling out the evidence above mentioned offered by the defendant, and further erred in rendering judgment for the plaintiff. There is no merit whatever in either of these complaints. It is the law of this state, and, as far as we are aware, of all jurisdictions, that the insolvency of a corporation, and its discontinuance of the business for which it was

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organized, does not deprive it of the power of collecting and enforcing claims due to it in its own name. It was so held by this court in *Butchers and Drovers' Bank v. Pulitzer*, 11 Mo. App. 594, where the proof offered was precisely the same as was ruled out in this case, and where this court held the proof was properly ruled out. It was so held by the supreme court in *Kansas City Hotel Company v. Sauer*, 65 Mo. 279, and *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286. There is no difference whatever between the propositions decided in those cases, and the propositions arising in the present case. Whether the directors in an insolvent corporation are chargeable as trustees in dealing with corporate assets, is an entirely different question, with which the defendant in the present suit has no concern. The defendant is sued for a claim, which he admits is justly due to the corporation, and under the decisions the corporation as such is legally entitled to enforce the claim.

Nor can we see any merit whatever in the proposition contended for, that no legal authority to prosecute this suit on behalf of the corporation is shown. The law in this state is settled by a course of uniform adjudications that no formal resolution of the board of directors is prerequisite for the employment of counsel for a corporation. *Western Bank v. Gilstrap*, 45 Mo. 419; *Southgate v. Railroad*, 61 Mo. 89; *Thompson v. School District*, 71 Mo. 495; *Holmes v. Board of Trade*, 81 Mo. 137. In the case last cited, Judge HOUGH says: "A contract for legal services may be made by the tacit or implied consent of the board of directors;" and, in *Thompson v. School District*, *supra*, Judge SHERWOOD says: "Of course, if we concede the power, without formal resolution, to employ an attorney, the usual results of such employment will follow as a necessary consequence." The question in that case was whether the entry of the appearance of the corporation as a party defendant by attorney was duly authorized.

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It will be thus seen that every proposition urged by the appellant has been determined adversely to him by prior decisions of courts of last resort in this state. Such being the case, the plaintiff is justified in insisting that the judgment should be affirmed with damages. All the judges concurring, the judgment is affirmed with ten per cent. damages.

JOHN LALLY, Respondent, v. THOMAS CANTWELL, Appellant.

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St. Louis Court of Appeals, March 18, 1890.

1. **Apprentices:** CUSTOM. The apprenticeship of a minor is not valid or binding, unless made by indenture pursuant to the requirements of the statute. And a custom of otherwise apprenticing minors, being contrary to the positive mandate of the statute, is illegal.
2. **Damages.** When a person is held liable for wrongfully and maliciously procuring the discharge of a servant by his master, the measure of damages is the same as in the case of a suit by the servant against the master for a wrongful discharge.
3. ———: BURDEN OF PROOF. The burden of proving in such case, in mitigation of damages, what the servant earned or could have earned during the period of time in question, is on the defendant. And proof that the servant secured other employment during such period, without any evidence as to what was earned by him, *held* not to entitle the defendant to complain that the jury did not make sufficient allowance for such earnings in their verdict.
4. **Practice, Appellate.** When a cause has been once appealed and, being remanded, is tried in accordance with the opinion of the appellate court, error cannot be assigned of the rulings of the trial court in so doing, the decision of the appellate court being *res adjudicata.*

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

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Rowe & Morris, for the appellant.

Frank A. C. McManus, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action for maliciously interfering with the plaintiff's business by the publication of a false and malicious libel, whereby the plaintiff was deprived of employment, and hindered in his employment and trade as a plumber. The petition, which is very inartificially drawn, was demurred to by the defendant as stating no cause of action, and the demurrer was sustained by the trial court. The plaintiff thereupon appealed to this court and we reversed the judgment, holding that the petition did state a cause of action, in alleging malice on part of defendant and injury to plaintiff as a direct consequence of the defendant's malicious act, and that the facts thus stated, according to the weight of authority both here and in England, gave to the party injured a cause of action. The case upon its former appeal is reported, 30 Mo. App. 524, where the plaintiff's petition, being the same petition on which the case was ultimately tried, is set out in full.

The libelous publication, which is claimed to constitute the malicious interference, consisted of a printed circular which the defendant sent to a number of master plumbers in the city of St. Louis, and which was in the following words:

"John Lally, an apprentice in my shop, not out of his time, quit work without cause on August 1. If he is working for you now, or applies for work, you will understand the situation. Article eleven of the by-laws covers the case."

The defendant filed an answer after the cause was remanded for trial, which, after admitting the publication of the circular above set out, denied that it was false and malicious, and set up affirmatively "that before the publication of said circular, to-wit, on July

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31, 1887, John Lally was an apprentice in the employ of this defendant, and that he quit work without cause on August 1, 1887. Wherefore defendant says that the words written in said circular are true in substance and in fact."

Upon the pleadings thus framed, the parties went to trial before a jury, and the plaintiff recovered judgment for nine hundred dollars, three hundred dollars of which was, according to the verdict of the jury, for compensatory, and six hundred dollars for exemplary, damages. The defendant assigns for error that the plaintiff failed to make out a *prima facie* case; that the court misdirected the jury, and that the damages both compensatory and exemplary are excessive.

Whether the plaintiff made out a *prima facie* case depends, in the present state of the record, solely on the fact whether he has by proof substantiated the allegations of the petition. If so, we cannot put the trial court in the wrong for refusing defendant's demurrer to the evidence, as we have formerly adjudged that the petition does state a cause of action, and that decision under well-settled rules governing appellate procedure is the law of this case. The publication was admitted. It appeared in evidence that, when the plaintiff quit the defendant's employ, he was a minor, and had been working for the defendant under an oral contract of employment; that he was never bound by any indenture as required by sections 4081, 4082 and 4083 of the Revised Statutes of 1879, then in force. The first of these sections provides that no minor shall be bound as an apprentice, unless by an indenture of two parts, and the last section provides that "all indentures, entered into otherwise than as herein provided, shall be, as to all apprentices under age, utterly void." It, therefore, conclusively appeared that the circular was false, both in stating that the defendant was an apprentice in the defendant's shop, and that he had quit work without cause (*i. e.*, wrongfully). As

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the plaintiff was not apprenticed by indenture, he was not an apprentice under the laws of this state, and, as no valid contract existed between himself and the defendant, he might rightfully quit the employment at any time.

On the question of malice, the plaintiff adduced the following evidence: The defendant, after the discharge of the plaintiff by Killoren, sent these circulars to other master plumbers of the city. The plaintiff's mother and sister called upon the defendant to remonstrate with him. The mother testified as to what passed between herself and the defendant as follows: "I introduced myself to Mr. Cantwell; he didn't know me, and I told him I had come to get him to let my son alone, and he asked me 'how he was getting along.' I said, 'well, if you would let him alone.' 'No, I won't,' he says, 'He has got to come back and obey me, for he has to do it; for, in the city of St. Louis, I won't allow him to work, no, nor in the United States, if I should wish; but out of St. Louis I will let him alone. Why I should have issued those circulars before, as Mr. Able,—Graham and Peters had advised me to do so, but I thought he was playing ball. Why, no plumber should hire him, none should hire him, not in the city of St. Louis.' And I begged of Mr. Cantwell and stated our circumstances to him, that he was the principal support of a young family. He said 'he didn't care, that he would have to come back and obey him,' and I asked him for how long; he was then over five years working, working at the trade, but not with Mr. Cantwell, he was then twenty-one years. He said it would make no difference if it was forty,—the words he used, he would have to come back and obey him, Says I, 'You will not let him alone?' 'No,' he says, 'not in the city of St. Louis;' he has got to come back and obey him."

The sister testified on the same subject: "When mamma saw Mr. Cantwell she said, 'I come to see, Mr.

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Cantwell, if you won't leave Johnny alone? He is doing very well,—he was doing very well until he received those circulars, and he is thinking of going away, and I can't let him go, and I want to know if you won't let him alone. He said, 'No, I won't;' he said, 'Johnny has a stiff neck and it needs bending, and it will take me to bend it. He will have to come back and obey me;' and three times, distinctly, he repeated that he would have to come back and obey him."

The plaintiff himself testified on the same subject: "I told Mr. Cantwell that I was working for Mr. Killoren, and that he had received this notice, and that I could go back to work for him if he would let me, if he would grant me a permission, and he told me that he wouldn't do anything of the kind; that I had to work for him or leave the city. I asked him why he done that, as he had no claim on me. He said, 'All right if I haven't, you will either work for me or leave the city.' I told him if he would let me alone, I could get work at the business, but otherwise I could not."

The foregoing observations will suffice to show, that there was ample evidence before the jury to show express malice, and a malicious interference with plaintiff's work, and as there was proof that the circular was both false and malicious, and interfered with the plaintiff's employment, the plaintiff had, under the rulings of this court, when the case was last here, made out a *prima facie* case, because he had substantiated the allegations of his petition by proof.

This is not simply an action of libel as the defendant seems to contend, but, even if it were to be governed by rules applicable to actions of libel, the defendant would have no reason to complain of the court's instructions. The court told the jury in its instructions that, if the plaintiff was an apprentice under the custom of plumbers, and quit before the expiration of his term as apprentice, without any cause, the jury should find for the defendant, unless they should further find that

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defendant was moved by express malice in sending out the circulars. In thus instructing the jury the court went further in defendant's favor than the evidence warranted. There can be no apprenticeship by custom in derogation of the positive mandate of a statute, which is one of public policy. When the statute says that all contracts of apprenticeship, except by indenture, shall be void, it necessarily expressly prohibits an apprenticeship by custom. Before the jury under this instruction could find for the plaintiff, they were bound to find express malice, even though, as above seen, the facts that the statements of the circular were false appeared by the conceded facts as a conclusion of law.

It is needless for us to discuss, whether or no, under the provisions of section 14 of article 2 of the Constitution of Missouri, and under section 2081 of the Revised Statutes of 1889, as the defendant claims, the truth of a publication is a complete defense in a civil action for defamation, since, as above seen, there was no legal evidence in this case tending to show the truth of the publication.

This brings us to the question of damages. We are aware of no rule of law, which would authorize us to review the amount of exemplary damages awarded, unless the award is so grossly excessive as to clearly indicate prejudice, partiality or corruption on the part of the jury. In *Munter v. Bande*, 1 Mo. App. 485, this court refused to disturb a verdict of one thousand dollars which necessarily consisted almost wholly of exemplary damages, as the actual injury inflicted was but nominal. Hence we do not feel at liberty to disturb the jury's discretion in this case in awarding the sum of six hundred dollars as exemplary damages.

The question of compensatory damages, however, is subject to review. The action as above seen is one of malicious interference with the plaintiff's employment by a defamatory publication. The plaintiff gave

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evidence tending to show that, but for such interference, he would have secured employment with his then employer, for one year at nine dollars per week, making an aggregate of four hundred and sixty-eight dollars per annum. *Prima facie*, this sum was a proper measure of damages, as the case seems to fall within the class fixing damages in cases of wrongful discharge of the servant by the master. The measure of damages in those cases is the contract price, although the master may recoup the damages by showing that the servant either earned, or by reasonable exertion might have earned, money in other employment during the contract period. Wood on Master and Servant [2 Ed.] pp. 245, 246; *Koenigkraemer v. Glass Co.*, 24 Mo. App. 124; *Miller v. Boot and Shoe Co.*, 26 Mo. App. 57. But the burden of proof in recouping the damages is upon the master. Nor is the servant in such cases confined to the damages which have accrued up to the institution of the suit, or even up to the day of trial, as the defendant's counsel erroneously supposes, where the damages are of a continuing character. *Miller v. Boot and Shoe Co.*, *supra*. Now, in the case at bar, there was some evidence that the plaintiff did, during the year after he was discharged by Killoren, obtain employment for four months in the state of Arkansas, and for various periods, not designated, in the city of St. Louis, but there was no evidence what the plaintiff earned in these employments, and certainly no evidence tending to show that he earned more than one hundred and sixty-eight dollars. Thus it will appear that the trial court could not determine by any evidence adduced on the part of defendant, recouping the *prima facie* measure of plaintiff's damages, that the damages awarded by way of compensation were excessive, and we are equally at a loss to do so.

This disposes of all the errors assigned by the defendant. We conclude that neither of them are well assigned and affirm the judgment. All the judges concurring, it is so ordered.

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Rombauer, P. J., also delivered the following opinion of the court, upon the motion of the appellant to set aside judgment and transfer the cause to the supreme court.

We are asked to set aside the judgment herein, and to transfer the cause to the supreme court, because it involves the construction of the constitution of this state.

We held, upon a full examination of the record, that there was no evidence tending to show that the defamatory publication was true, but that, on the contrary, it conclusively appears from the testimony of the defendant as well as that of the plaintiff that it was not true. The defendant in his motion fails to point out any part of the record tending to show that the publication was true. Under these circumstances we see no foundation whatever for the claim now advanced that the cause involves a construction of the constitution of this state.

All the judges concurring, the motion is overruled.

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Rochester Ford, Administrator of the Estate of James M. O'Donnell, Respondent, v. Miles O'Donnell, Defendant, and Mary R. Talmage, Executrix of the Estate of A. A. Talmage, Appellant.

St. Louis Court of Appeals, March 18, 1890.

1. **Administration: assignment of share of distributee.** An assignment by a distributee of an estate of his share or interest therein, though made for value, passes such interest subject to the right of the administrator by suit in equity to have it applied to the satisfaction of indebtedness of the distributee to the estate.

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2. **Judgment:** COMPETENCY, AS EVIDENCE. A judgment obtained by such administrator against such distributee is not competent evidence of the existence of the indebtedness sued on as against a prior assignee of such distributee.

3. ——— : ———. Nor is such judgment rendered competent evidence of such indebtedness against such assignee by reason of the fact that, prior to the rendition thereof, the administrator of the estate notified such assignee of the pendency of the suit in which the judgment was recovered, and in such notice also accorded to such assignee the right to appear in, and defend against, such suit.

4. **Witnesses:** EFFECT OF DEATH OF A PARTY TO A CONTRACT. Notwithstanding the death of a party to a contract, the other party is competent to testify in regard to it, when he is neither a party of record nor in interest to the suit in which he is called to testify, and in no sense testifies in his own favor.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

H. S. Priest, for the appellant.

Silas B. Jones, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

James M. O'Donnell died intestate in the year 1886, and the plaintiff became his administrator. The defendant Miles O'Donnell, his son, is one of his heirs and a distributee of his estate. On December 1, 1886, the defendant Miles, for a valuable consideration, assigned and transferred all his interest of every kind in the estate of James M. O'Donnell to A. A. Talmage. Talmage afterwards died leaving a will, under which the defendant Mary qualified as executrix.

In October, 1886, the plaintiff, as such administrator, instituted suit against the defendant Miles on certain promissory notes, found among the effects of James M. O'Donnell. In this suit such proceedings

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were had, that thereafter, on April 16, 1888, the plaintiff, as such administrator, recovered judgment against Miles O'Donnell for twenty-two hundred and eighty-three dollars and fifty cents. Afterwards, on December 16, 1887, the plaintiff instituted a second suit against the defendant Miles on addition al notes found among the assets, and in such second suit recovered judgment for four thousand and fifty-two dollars and thirty-four cents against the defendant Miles, on February 9, 1888.

On January 16, 1888, the plaintiff notified the defendant executrix in writing, that he had instituted these two suits, that it was his purpose to prosecute them to judgment, and to have the judgments obtained satisfied out of the interest of Miles O'Donnell in his father's estate, in preference to any claim advanced by the executrix as assignee. He further notified her that he had no objection to her appearing and making any lawful defense to said actions or either of them. The executrix did not appear; Miles O'Donnell made no defense whatever; and these judgments were obtained by default.

The plaintiff administrator, being thereafter ready to make final settlement and distribution, and the distributive share of said Miles in the estate in the hands of the administrator for distribution amounting to less than two thousand dollars, the plaintiff applied to the probate court for leave to apply the said distributive share to the payment *pro tanto* of the judgment, which he as administrator held against Miles. The probate court so ordered, and the defendant executrix appealed from the order successively to the circuit court and this court. We reversed the judgment of the circuit court, which was to the same effect as that of the probate court, and, in doing so, we held that the probate court was without jurisdiction to make the order which it attempted to make; that the matter of adjusting equities on final distribution was strictly of equitable

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cognizance, of which the circuit court alone had original jurisdiction. The case on its former appeal is reported in 36 Mo. App. 65, where the facts of the case, and the grounds of our decision, are set out in full.

The plaintiff thereafter instituted the present proceeding against Miles O'Donnell and the defendant executrix in the circuit court, reciting in his petition the facts hereinabove set out, and concluding as follows: "Premises considered, the plaintiff invokes the exercise in his behalf of the equitable powers of this court; and prays that it be adjudged by this court herein that the said distributive share of Miles O'Donnell, in the personal estate of James M. O'Donnell, deceased, be retained, held and applied by the plaintiff in payment and satisfaction *pro tanto* of the debts aforesaid of the said Miles O'Donnell to the estate of the said James M. O'Donnell, deceased, and that the said distributive share of the said Miles O'Donnell, so adjudged to be held and applied in payment of said debts as aforesaid, be adjudged to be distributed by plaintiff to the other heirs and distributees of the estate of the said James M. O'Donnell; and plaintiff prays for such other and further and general relief in the premises as may appear proper to the court."

The defendant Miles O'Donnell made no answer, but suffered default. The defendant executrix answered, stating the assignment to her decedent for value, long prior to the recovery of these judgments, by Miles O'Donnell, of his entire interest in his father's estate. The defendant further answered that the notes, forming the foundation of the judgments recovered against Miles O'Donnell, were notes given to James M. O'Donnell without any consideration whatever being received therefor by said Miles, or any other person, and were mere accommodation notes; that these facts were well known to Miles O'Donnell, and that he had a perfect

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defense to these actions, but permitted judgment to go against him therein fraudulently and collusively for the purpose of defrauding the estate of A. A. Talmage of all benefit, which would accrue to said estate under the assignment made by him of all his interest as heir of his deceased father.

Upon the trial of the cause before the court below, the plaintiff gave evidence of the facts stated in his petition. He first offered in evidence the record in the cause wherein the judgment for twenty-two hundred and eighty-three dollars and fifty cents was recovered. It appeared from said record that the suit was brought upon three promissory notes, all signed by H. Cook & Co., and payable to the order of James M. O'Donnell, Hugh Cook and Miles O'Donnell being charged in the petition as partners. In connection with the record the plaintiff offered in evidence said three notes. The defendant executrix objected to this evidence for the reason that, if the bill in this case counts upon the notes, then the notes are merged into the judgments, and the action is upon the judgments, and not upon said notes. As to the judgments offered in evidence the defendant objected, because they were *res inter alios acta* and only affected the persons who were parties to that suit, and could in no way affect the interest of Mrs. Talmage acquired before such judgments were rendered. The court overruled these objections, and admitted the judgment and notes in evidence, and the executrix excepted.

The plaintiff then offered in evidence the record in the cause wherein the judgment for four thousand and fifty-two dollars and thirty-four cents was recovered, and, in connection with such judgment, two notes and one check, all signed by H. Cook & Co., and payable to James M. O'Donnell. The same objection was urged and the same ruling was made by the court, the defendant saving her exception. In ruling on this evidence

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the court observed: "I will let the notes in, but, in summing up the case, the question will be *whether plaintiff has sufficiently proven an indebtedness; whether the proof put in evidence and the pleadings show an indebtedness from Miles O'Donnell to James O'Donnell.*"

Other evidence was offered by the plaintiff, showing admissions of Miles O'Donnell and Hugh Cook of the indebtedness hereinabove stated to James M. O'Donnell, but, as the evidence was clearly incompetent, unless it be for the impeachment of Hugh Cook's evidence as hereinafter stated, and as the record fails to show that the court admitted the evidence, the subject need not be considered.

The plaintiff also gave in evidence the written notice, served upon the executrix while the suits against Miles O'Donnell were pending, and referred to in a prior part of this opinion. He then proved by his own evidence that he knew personally nothing of the indebtedness of Miles. O'Donnell to his father, except what appeared from the notes and check sued upon; that, finding these obligations among the effects of James M. O'Donnell, he considered it his duty to inventory them, and to seek to collect them; and that, in so doing, he did not confer with any members of James M. O'Donnell's family, nor with Hugh Cook.

On cross-examination of the plaintiff it was shown that, when the first suit was instituted, Miles O'Donnell filed an answer denying any indebtedness to his father, and stating that these obligations were executed by the firm of H. Cook & Co., for the accommodation of James M. O'Donnell, without any consideration whatever, to enable him to raise money thereon, and that all matters between himself and James M. O'Donnell had been adjusted prior to the decease of the latter, he, the said Miles, receiving a full release of all claims from his father. This answer was filed December 7, 1886, a few

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days after the assignment by Miles O'Donnell of his interest in his father's estate to Talmage, and was withdrawn April 16, 1888. On the last-named day the defendant Miles signed the following paper seemingly at the request of the counsel of the plaintiff in this cause: "Now comes the defendant Miles O'Donnell, and withdraws his answer in this case, and declines to answer further the petition of the plaintiff." No answer was ever filed in the second suit upon the notes. In the present suit Miles O'Donnell entered his voluntary appearance, waiving service, but did not answer.

The defendant executrix then called Hugh Cook, who testified in substance as follows: He was requested to come to the city of St. Louis by James M. O'Donnell, who agreed to pay him a salary of thirty-five dollars per month and his board for work in a boot and shoe store, in which the defendant Miles was engaged. When he came he found the sign H. Cook & Co. over the store. He had no interest in the store, but was simply an employe of James M. O'Donnell. All the notes, signed by him in the name of H. Cook & Co. were signed at the request of James M. O'Donnell, and, as far as he knew, H. Cook & Co. received no consideration for any of them, and never borrowed any money from James M. O'Donnell or any one else. As far as he knew, Miles O'Donnell never borrowed any money from his father. He, the witness, merely loaned his name to Miles O'Donnell, at the request of his father, and was a mere figure head, knowing nothing whatever about the finances, and signing all the notes by order of James M. O'Donnell.

When this testimony of Cook was offered, the plaintiff objected to it on the ground that, Cook being one of the original parties to the contracts to which James M. O'Donnell was the other party, he was incompetent to testify owing to the death of James M. O'Donnell. The court ruling on this objection said: "I will take this testimony subject to objection, my present impression

being that the objection is well taken." As it does not appear by any subsequent part of the record that this evidence was admitted by the court, we must conclude that the court adhered to its original opinion, and did not consider the evidence in passing upon the case.

Upon this evidence the court made a finding and decree according to the prayer of the petition. In doing so, the court admitted in evidence the judgments rendered against Miles O'Donnell in favor of the administrator, on the ground that nothing passed by the assignment, except such interest as Miles has in his father's estate, subject to the claims of the estate against him, and hence the defendant executrix had a direct interest in the ascertainment of the question, what that interest was, and, having declined to appear and defend when notified, was precluded by the judgments. While the court's opinion does not indicate whether it considered the judgments conclusive or only *prima facie* evidence of the indebtedness, the necessary logic of its ruling is that they were conclusive, and not subject to impeachment in this proceeding.

The executrix, appealing, assigns for error that the court erred in holding that the equities of the administrator were superior to hers as assignee of Miles' share in the estate; that the court erred in admitting the judgments in evidence, and further erred in deciding that the judgments, under all the evidence in the case, proved an indebtedness on the part of Miles O'Donnell to his father's estate, greater than the distributive share of Miles O'Donnell, or that it proved any indebtedness. We shall proceed to consider these objections in the above order, premising such consideration with the statement, that, as the proceeding is one in equity, the decree is subject to review here on the weight of the evidence.

When the case was last here we said, in considering the point first presented: "There can be no question that, under certain circumstances, the right exists to

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deduct from the distributive share of one of the heirs any indebtedness due from the heir to the deceased *at the time of death* and remaining unpaid;" and, again: "We think that the true ground on which this doctrine rests is the equitable right of the administrator, by appropriate proceedings, to *impound* the interest of the distributee, and by decree of court to have the debt, if larger than the distributive share, paid *pro tanto*, by applying the amount due on distribution as a credit thereon. *Ballard v. Marsden*, 14 Chan. Div. 374."

The defendant executrix now claims that her decedent is an assignee for value; that the amount is not needed for the payment of debts, and that her equities are, therefore, superior to those of other distributees, who are mere volunteers, and for whose benefit alone the administrator now seeks to make the collection. The vice of this argument lies in the fact that it rests for support exclusively on the proposition that the decedent was an assignee for value. It is immaterial whether he was an assignee for value or not, as he could in no event obtain any greater right by the assignment than his assignor could convey. If his assignor, at the date of the assignment, was indebted to the estate, the administrator had a legal right to proceed against him, to prosecute the claim to judgment and to enforce such judgment against any property of the assignor. The administrator's equity rests in the fact that, during administration, and until the distributive share is ascertained, he is remediless to enforce such claim either in law or equity, in default of other property of the debtor, although the assets are in his hands all the time, and, if the amount were ascertained, he might offset one debt against the other, if sued. An assignment of a distributive share is not a conveyance of tangible property, but the assignment of an unliquidated claim, which is always subject to cross demands existing at the date of

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the assignment. The administrator by this proceeding simply seeks the enforcement of a legal right, for which he had no legal remedy. We must rule this assignment of error against the appellant.

The next assignment is that the court erroneously admitted in evidence the judgments recovered by the administrator against Miles O'Donnell. As above seen, the court upon the trial of the cause properly held that the plaintiff's case depended upon making sufficient proof of the indebtedness of Miles O'Donnell to his father's estate, to which we add the qualification "at the date of his father's decease," because it could not be contended that, if such indebtedness accrued after the assignment and notice thereof to the administrator, he could enforce it against the distributive share of Miles O'Donnell.

The record entry of a judgment is of course always evidence of the fact that a certain judgment had been rendered, and for that purpose it is competent evidence, whoever are the parties to the litigation. As the plaintiff's standing in a court of equity, under the decisions in this state, as against the defendant, depended upon the fact that the claim had been liquidated by judgment, it was further competent for the purpose of showing that the claim had been thus liquidated. We, therefore, do not see what harm was done to the defendant executrix by admitting these judgment entries in evidence, all the more so since her answer admits that these judgments were recovered. It is not in admitting these entries, but in giving to them a certain effect that the court erred, if at all.

Our statute provides (section 3465, Revised Statutes, 1879) that any person may be a defendant, who has or claims *an interest in the controversy* adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question *involved therein*. Now the executrix in this case did not claim

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any interest in the controversy between the plaintiff and Miles O'Donnell in the suit upon these notes. Those suits did not seek to enforce a lien against any property she held or claimed, nor was she a necessary party to any question involved therein. We might as well hold that one may in an action upon a promissory note make the grantees of the defendant parties co-defendant with him, simply because it is his ultimate design, after he recovers judgment, to levy such judgment upon property conveyed to them, and vacate such conveyances on the ground that they were fraudulent as to the creditors of the grantor. It would be still more illogical to hold that one may, in such a suit by a simple notice requesting grantees to come in and defend the suit, in the direct and immediate result of which they had no interest whatever, forever preclude them from questioning the validity of the judgment therein obtained, as far as they are concerned. And the latter proposition is the one which the court seems to have sanctioned in this case.

There are, of course, many cases arising upon warranties, reinsurance, mechanics' liens and other similar transactions, wherein the warrantor, reinsurer, contractor or other party owes a direct duty to the grantee, insured, owner or other party sued, and wherein, by the common law, terms of the contract or by statute, it is made the duty of the party notified *to hold the party sued harmless* from the effects of the judgment sought to be recovered against him, and wherein a judgment becomes conclusive against the party notified and failing to defend. *Strong v. Phœnix Insurance Co.*, 62 Mo. 289, cited by the trial court in its opinion, is only one of the numerous cases on that subject. But in all these cases the party notified was by law or contract placed under some obligation to the party sued, which is not the fact in this case; see *Wangler v. Franklin*, 70 Mo. 659, 661. We must conclude, therefore, that the court erred

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in holding that the executrix was precluded by these judgments, because she failed to appear and defend upon notice, or that, as to her, they were proof of any indebtedness existing by Miles O'Donnell to his father's estate, anterior to the date of the assignment. The mere fact that the result of that litigation might affect her interest in some manner thereafter did not take these judgments out of the general rule, which makes judgments, to which she was no party, inadmissible as *res inter alios acta.* *Wise v. Wimer*, 23 Mo. 237; *Norcross v. Hudson*, 32 Mo. 227, 229; *Cravens v. Jameson*, 59 Mo. 68; *Middleton v. Railroad*, 62 Mo. 579; *Strauss v. Ayres*, 87 Mo. 348, 350.

This brings us to the question whether the decree is supported by the weight of the evidence in other respects. The plaintiff offered in evidence the notes on which the judgment was founded, and the court admitted them against the defendant's objections. *Prima facie*, such written promises import a consideration both by the law merchant and our statute. In a proceeding by an indorsee for value before maturity, they are conclusive evidence both as to consideration and amount of value; as, between the original parties thereto, they are *prima facie* evidence of both, subject to impeachment. But it is difficult to see on what principle they can be evidence of amount of value, where the controversy is between the holder and a stranger to the paper, unless their admissibility can be supported on the theory that they are admissions against interest. If admissible at all, their weight as evidence rests on the most slender foundation.

To rebut whatever little weight there might be given to these notes as evidence of any debt, the defendant called both Chas. F. O'Donnell and Hugh Cook, who testified to facts leading to the almost unavoidable inference, that all these obligations, with the exception of two, amounting in the aggregate to one hundred and

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thirty dollars, were mere accommodation paper, and that the plaintiff's decedent gave no value for them. From what the court intimated upon the trial, it would appear that it rejected the testimony of Cook on the ground that he had become an incompetent witness, owing to the death of James M. O'Donnell, the other party to the contract. That view rests on a misconception of the law. A party to the contract, when the other party is dead, is incompetent under the statute only to testify *in his own favor.* R. S. 1879, sec. 4010. He is competent to testify, both at common law and under the statute, when he is neither a party to the record nor a party in interest, and when he testifies in no sense *in his favor. Angell v. Hester*, 64 Mo. 142; *Ring v. Jamison*, 66 Mo. 424, 429; *Meier v. Thieman*, 90 Mo. 433; *First National Bank v. Hunt*, 25 Mo. App. 170, 173. In the case at bar Cook was neither a party to the record, nor had he any interest whatever in the controversy, nor did his testimony in any way affect his liability, which had been fixed by previous judgments. Hence he was not disqualified as a witness for any purpose. If the defendant executrix had called Miles O'Donnell as her witness, the case would have been different, as he was both a party to the record and a party in interest within the decision of *Meier v. Thieman, supra*, as he conveyed his interest in the estate to the defendant's decedent, as the record shows, accompanied with a sworn declaration as to the extent of such interest. This, however, does not prevent the plaintiff from calling him as a witness, and his testimony in the present state of the controversy seems to be almost indispensable to a full understanding of its true merits.

The foregoing observations lead to a reversal of the judgment. At the same time we do not feel justified to make a final decree in the present state of the record. The case was tried under a misconception of the law, and not in a manner to elicit the true facts upon which

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the rights of the parties depend. The judgment is reversed and the cause remanded to be proceeded with in conformity with this opinion. In reversing the judgment all the judges concur; in remanding the cause, Judge BIGGS concurs. Judge THOMPSON is of the opinion that the notes offered in evidence by the plaintiff were no evidence whatever of any indebtedness on the part of Miles O'Donnell, and that we should terminate the litigation here by dismissing the bill. Whether such notes are *prima facie* evidence of consideration, or not, has not been discussed in argument by either party, and hence the majority of the court do not desire finally to commit themselves on that proposition either way, and are of opinion that the facts and the law on that question should be fully brought before the court before entry of a final decree.

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THE STATE *ex rel.* ROSE DALE, Respondent, v. L. L. ASHBROOK *et al.*, Appellants.

St. Louis Court of Appeals, March 18, 1890.

Costs: RIGHT OF PARTIES TO ENTER SATISFACTION. The costs taxed in a cause belong to the persons to whom they are payable, when collected; and a fee bill or execution may issue for unpaid costs, due to officers of the court, notwithstanding an acknowledgment of satisfaction of the judgment by the party in whose favor it was rendered.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

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David Murphy, for the appellants.

When any judgment or decree is satisfied otherwise than by execution, the party in whose favor the same was rendered shall immediately thereafter enter an acknowledgment of satisfaction thereof in the court where the same was allowed. R. S. 1879, sec. 2747. The acknowledgment so made shall forever discharge and release the judgment or decree. R. S. 1879, sec. 2751. The writ of execution is solely for the benefit of plaintiff. She is the only person interested in its enforcement. *Reddich v. Cloud*, 7 Ill. 670; *Morgan v. People*, 59 Ill. 58. The satisfaction of a judgment must terminate the period when execution can properly issue. Freeman on Executions [2 Ed.] secs. 19, 442; *St. Francois Co. v. Sugg*, 83 Mo. 478; *Weston v. Clark*, 37 Mo. 571.

D. D. Fassett and *T. M. Rowe*, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The plaintiff recovered a judgment against the defendant, in an action upon an attachment bond for six hundred and eighty-one dollars and twenty-five cents' damages, and, also, the costs of suit, and execution was awarded therefor. The defendants appealed to this court, but, not prosecuting their appeal, the plaintiffs (respondents) produced in this court a transcript of the record and moved for an affirmance of the judgment, which motion the court sustained. In the concluding part of the opinion of this court it was said: "This ruling in no way affects the defendants' right to resist the enforcement of the judgment so affirmed, provided it has been paid or settled in the *interim*, nor does it affect the question, which seems to be the sole controversy between the parties herein, as to which of them is responsible for the costs of the trial court. That question can be, and ought to be, settled by the

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trial court on motion for taxation, or retaxation, of costs." 38 Mo. App. 280.

On the cause being remanded, the plaintiff, by her attorney, sued out an execution; the defendants moved the court to quash the execution, and to retax the costs against the plaintiff; the court overruled this motion, and the defendants again appealed to this court.

On the hearing of the motion to quash the execution, it appeared that, subsequently to the rendition of the judgment, and after the lapse of the term at which it had been rendered, and while the former appeal was pending in this court, the plaintiff and the defendants met and agreed to a satisfaction of the judgment, and that, thereafter, the following paper, signed by the plaintiff, was lodged with the clerk of the circuit court, and by him filed (omitting caption): "And now comes plaintiff, the said Rose Dale, and acknowledges payment in full of the *debt* herein and satisfaction of judgment."

The contention of the defendants on this appeal is that, after the party, in whose favor a judgment is rendered, acknowledges satisfaction of it, it cannot be the foundation of an execution, even for the costs which are due the officers of the court. We do not take this view. At common law litigation was not conducted on the credit system, as with us, but the plaintiff *purchased* his writ, and each party paid his costs step by step as the services were procured and as the cause proceeded. At the end of the litigation the successful party recovered his *costs*—that is, the costs which he had paid out. The idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation, in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. *Roberts v. Roberts*, 6 Dowl. 556; *Anon.*, 1 Wils. 130.

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But with us the costs are not ordinarily paid step by step, as each party demands of the proper officer of the court the rendition of some particular service; but they generally accumulate until the litigation is finally ended, and then they are recovered *nominally* by the successful party, but really by the officer of the court to whom they are due. *Trail v. Somerville*, 22 Mo. App. 308, 312. We still keep up the ancient form, so far that, according to the judgment entry, the costs are recovered by the successful party, and the execution runs in the same way, so as to conform to the judgment; but they are never, in fact, collected by him, nor paid over to him. According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due. This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. *Garrett v. Cramer*, 14 Mo. App. 401. The party in whose name the costs are recovered is, in respect of them, at most, a trustee of a dry trust—so dry that he is not allowed to handle any of the trust fund. His name in the judgment and execution is a mere naked name of record. The use of it by the officers of the court, in securing their dues, saddles him with no responsibility and endangers his rights in no way. As this portion of the judgment nominally recovered by him belongs to others, and not to him, he cannot satisfy it, or bargain it away with the other party to the record without their consent. He can waive his own rights, but he cannot waive the rights of others.

The judgment will be affirmed. All the judges concur. Judge Biggs in the result.

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ROMBAUER, P. J., delivered the opinion of the court on appellants' motion for a rehearing.

The appellants move for a rehearing on the ground that the decision of the court is opposed to *Beedle v. Mead*, 81 Mo. 297, and to the provisions of sections 1016 and 2751 of the Revised Statutes of 1879.

In *Beedle v. Mead*, *supra*, the suit was dismissed upon a memorandum signed by the parties litigant, each party agreeing to pay half the costs. A judgment was entered by the court accordingly with an award of execution for one-half of the costs against the plaintiff and defendant respectively. The deputy clerk of the circuit court without the direction of any party, not even his principal, issued an execution against the plaintiff for all the costs remaining unsatisfied in the case, under which he and the deputy recorder of the county bought in, by collusion, for fifteen dollars, two hundred and forty acres of the plaintiff's lands, worth at least twenty-four hundred dollars, with the design of cutting out a deed of trust of thirty-five hundred dollars and more, which was a lien subsequent to the lien of the judgment for costs. The case came to the supreme court upon an appeal from a judgment upholding this collusive and fraudulent sale against the purchaser under a deed of trust.

In reversing that judgment, Commissioner PHILIPS uses some language, which gives countenance to the views advanced by the appellant herein. The following part of his opinion shows the true ground on which the decision of the court rests: "The transaction is indefensible. Justice would be both blind and deaf not to rebuke it. Here are two hundred and forty acres of land worth twenty-four hundred dollars, sacrificed to collect a most inconsiderable fee of two or three dollars due questionably, when the execution was issued. These defendants bought it in at less than seven cents an acre, when two acres would have more than satisfied the claim." Commissioner MARTIN in a

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separate concurring opinion says: "I concur in the opinion reversing the case on account of the equity disclosed in the facts in evidence. But I do not concur in so much of the opinion as denies to the officers of the court, under all circumstances, final process by execution for the collection of costs taxed in their favor. I regard the costs, as taxed in the fee book in favor of the officers of the court, as collectible on execution. They constitute a lien. And the process, upon a judgment for costs, necessarily is for the benefit of the person in whose favor they are taxed. If the plaintiff has advanced them, he is entitled to receive them. If he has not advanced them, he has no right to receive them. Neither can he, in such case, discharge them."

The views expressed by Commissioner MARTIN are the correct views, as will appear by the provisions of section 5595 of the Revised Statutes of 1879, which entitle officers of courts to have their fees collected by fee bill upon their own motion after the end of each term, regardless of the plaintiff's or defendant's direction. This section is certainly opposed to the views of Commissioner PHILIPS, as expressed in the language relied on by the appellants, namely, that "the plaintiffs may forgive the debt *and costs*, if they choose, and officers have no right to interfere." That the officers may enforce their judgment for costs by independent process even in case where a *supersedeas* bond has been given superseding the collection of the judgment, has been expressly decided in *State ex rel. v. Emmerson*, 74 Mo. 610.

The only apparent complaint that the appellants have is that, in this case, the process was an execution and not a fee bill. As the judgment was final, and the costs were never satisfied by any judgment of the *court* nor even pretended to be satisfied by the memorandum filed by the parties, even this objection is wholly without merit.

All the judges concurring the motion for rehearing is overruled.

ADA WILLI, Appellant, v. EUGENE E. LUCAS, Respondent.

St. Louis Court of Appeals, March 18, 1890.

Jurisdiction, Appellate: AMOUNT IN CONTROVERSY. The supreme court has jurisdiction of an appeal taken by a plaintiff from a judgment for the defendant in an action for personal injuries in which the damages are laid in a sum exceeding twenty-five hundred dollars, and there is nothing in the record debarring the plaintiff, if he has a cause of action, from recovering more than said sum.

Appeal from the Montgomery Circuit Court.—HON. E. M. HUGHES, Judge.

TRANSFERRED TO SUPREME COURT.

Sol. Hughlett, for the appellant.

Emil Rosenberger, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action for injuries to the plaintiff's person, the damages in the petition being laid at ten thousand dollars. Upon the trial of the cause, the court instructed the jury to find a verdict for the defendant which they did. There is nothing in the record showing that, if the plaintiff was entitled to recover at all, she was not entitled to recover an amount exceeding twenty-five hundred dollars, and hence the supreme court has exclusive jurisdiction of this appeal. All the judges concurring, it is ordered that the clerk at once transfer the record in this cause with a copy of the order of transfer to the supreme court.

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JENNIE BECK by her next Friend, OLIVER BECK, Respondent, v. ELIJAH B. DOWELL, Executor of Estate of ZACHARIAH HARRIS, Deceased, Appellant.

St. Louis Court of Appeals, March 18, 1890.

1. **Actions for Personal Injuries:** DEATH OF DEFENDANT. An action for injuries to the person abates on the death of the defendant, but, if the death occur after judgment against the defendant, the judgment is valid until reversed, and an appeal therefrom is properly taken in the name of the defendant's executor.

2. **Pleading:** MITIGATION OF DAMAGES. In actions for personal injuries evidence in mitigation of damages is admissible under a general denial.

3. **Damages:** EVIDENCE OF PLAINTIFF'S PECUNIARY CONDITION. When a case warrants exemplary damages, evidence of the pecuniary condition of the plaintiff, and of the plaintiff's family, is admissible; and the admission thereof is not error, if the evidence in the cause at the time would have authorized the assessment of such damages by the jury.

4. **Practice, Appellate:** NON-PREJUDICIAL ERROR. The admission by the trial court of evidence establishing merely a state of fact, which the law would have presumed in the absence of evidence, *held* not prejudicial.

5. ——: EXCESSIVE VERDICT. A verdict for seven hundred and fifty dollars *held* not excessive as compensatory damages for a painful flesh wound through the thigh, made by a pistol shot.

Per Biggs, J., dissenting:

6. **Damages:** EVIDENCE OF PECUNIARY CONDITION OF PLAINTIFF AND FAMILY. In an action for personal injuries, evidence of the pecuniary condition of the plaintiff or of her family is inadmissible, even when the facts of the case are such as to warrant exemplary damages.

7. **Practice, Appellate:** PREJUDICIAL ERROR. Error in the admission of such evidence against proper objection is prejudicial, even though other evidence properly admitted in the cause may have led to a surmise of the state of the plaintiff's pecuniary condition. Error is presumed to have been prejudicial unless the contrary appear from the record.

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8. **Practice, Trial:** SAVING EXCEPTIONS. *Semble*, that the mere failure of a party to expressly save an exception to an adverse ruling should not debar such party from assigning error of such ruling; an exception should be presumed.

9. **Evidence:** RES GESTÆ. Evidence of the acts of a person who was not a party to the suit held admissible as part of the *res gestæ*.

Appeal from the Lewis Circuit Court.—HON. BEN. E. TURNER, Judge.

AFFIRMED (*and transferred to Supreme Court*).

Blair & Marchand and *M. McKeag*, for the appellant.

(1) The court erred in sustaining the plaintiff's motion to strike out part of defendant's answer, if the matter stricken out tendered any defense, in whole or in part, to the action or any part of the action. *Justice v. Town of Lancaster*, 20 Mo. App. 559; *Kerr v. Simmons*, 82 Mo. 269. (2) The matters pleaded were largely mitigating circumstances and justifications for the shooting, and it was necessary to plead them. *Buckley v. Knapp*, 48 Mo. 152; *Deenhart v. Schmidt*, 7 Mo. App. 117; *White v. Maxey*, 64 Mo. 552. (3) The admission of evidence as to the wealth of the defendant was improper. There was nothing in the evidence to show that the acts of Harris were either wanton or malicious and done intentionally without just cause. Plaintiff was entitled to recover, if at all, only compensatory damages; hence the court should have sustained the objection to the evidence as to the defendant's wealth, and undoubtedly as to plaintiff's wealth, as being incompetent. *Frantz v. Hilterbrandt*, 45 Mo. 121; *Engle v. Jones*, 51 Mo. 316; *Brown v. Cape Girardeau*, 89 Mo. 152.

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Clay & Ray, *F. S. Schofield* and *John C. Anderson*, for the respondent.

(1) We insist that the court committed no error in striking out portion of the defendant's answer. The matters and things therein alleged, if admissible in evidence at all, were admissible either under a general denial, or plea of justification, and in fact were admitted. *Nichols v. Winfrey*, 79 Mo. 544, 549; *Joice v. Branson*, 73 Mo. 28; *Sparling v. Conway*, 75 Mo. 510; 2 Greenl. Ev. [3 Ed.] sec. 93. Matters in mitigation of damages cannot, or at least ought not to, be pleaded except in the actions of libel and slander. *Rosenthal v. Brush*, 1 Code Rep. (N. S.) 228; *Travis v. Barger*, 24 Barb. 614. But, even if the court committed an error in sustaining the motion to strike out, all the matters alleged were admitted in the evidence. The defendant had the benefit of them. He sustained no injury and cannot now complain. (2) The court committed no error in admitting evidence to show the financial condition of plaintiff, her father and mother, and of defendant. *Clements v. Maloney*, 55 Mo. 352; *Daily v. Huston*, 58 Mo. 361; *Kennedy v. Holladay*, 25 Mo. App. 511; *Polston v. See*, 54 Mo. 294; *Buckley v. Knapp*, 48 Mo. 162; *Renfro v. Frior*, 22 Mo. 409.

Rombauer, P. J., delivered the opinion of the court.

The plaintiff is a minor, and she prosecutes this suit by Oliver Beck as next friend. The defendant has died since the trial, and his executor has been substituted as a party. The case, therefore, is in this condition: The executor properly prosecutes this appeal, because, under our code of practice, appeals perform merely the functions of writs of error, and the validity of the judgment, and not of the original claim, is the subject of inquiry. *Lewis v. Railroad*, 59 Mo. 495. But, if the judgment is reversed, the plaintiff is remitted to her

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original claim, and, as that claim is one for injuries to her person, it is lost forever. R. S. 1879, secs. 96, 97; *Stanley v. Bircher*, 78 Mo. 247.

Under such circumstances, it is incumbent upon us to scrutinize the record very carefully to determine whether any error, which may have intervened in the trial of the cause, was clearly prejudicial to the appellant. If we are satisfied that such intervening error has materially affected either the right or extent of the recovery, the mere fact, that a reversal of the judgment debars the plaintiff from all redress, should not prevent us from reversing it. On the other hand, if we are not thus satisfied, we should not, for the sake of vindicating technical precision, sacrifice substantial justice.

The plaintiff averred in her petition that the defendant Zachariah Harris without just cause or provocation, but wickedly and maliciously, wounded and injured her with a leaden bullet, shot or discharged from a pistol, and that the wound thus inflicted caused a permanent injury, and also caused her great physical and mental suffering.

The defendant's answer contained: *First.* A general denial. *Second.* A plea of justification. *Third.* Facts and circumstances in mitigation of damages.

The cause was tried by a jury, and a verdict for seven hundred and fifty dollars against the defendant was returned into court, and judgment was entered accordingly.

All instructions given and refused by the court have been lost, and, in passing on the case, we are necessarily confined to the examination of errors arising out of the admission or rejection of evidence, and the action of the court in respect of the sufficiency of the pleadings.

I. The first error assigned by the defendant, and to which our attention has been directed by counsel, is the order of the court sustaining a motion to strike out

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a portion of the defendant's answer. The portion of the answer objected to, and which was stricken out by the court, contained a detailed statement of the circumstances under which the assault was made, and, if true, had a tendency to prove that the act complained of was justifiable, or, at least, was not wanton or malicious in its character.

The action of the court in striking out this portion of the answer cannot be held to be error. In actions for personal injuries, evidence in mitigation of damages may be given under a general denial. Boone on Code Pleading, sec. 76; *Hays v. Berryman*, 6 Bosw. 679; *Smith v. Lisher*, 23 Ind. 500. This was the rule at common law (2 Greenleaf on Evidence [14 Ed.] sec. 93), and it has not been changed by our code of civil procedure. It is only in actions for slander or libel that mitigating circumstances may be set forth in the answer. R. S. 1879, sec. 3553.

But, aside from this, it appears that the defendant was not prejudiced by this action of the court, since he was permitted on the trial to show the mitigating circumstances relied on by him. We will have to rule this assignment against the defendant.

II. The only other errors assigned relate to the action of the court in admitting and rejecting testimony, and to its action in refusing to set aside the verdict, which the defendant claims is excessive and the result of prejudice.

As above stated, there are no instructions preserved in the record, and we must, therefore, assume that the court correctly instructed the jury on all issues properly raised by the evidence. It is elementary that, where the record is silent, all admissible presumptions must be made in support of the action of the trial court. We must further keep in view that, in determining the correctness of the rulings of the trial court on the evidence, we must take the state of the evidence when the

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rulings were made, and, for the purpose of determining whether the verdict is supported by the evidence, we must consider the plaintiff's evidence alone, as the question of the weight of evidence, and credibility of witnesses, are questions for the jury, and not for us.

The plaintiff's evidence tended to show the following facts: The decedent was a farmer, and the plaintiff's father was his tenant occupying a portion of the farm. Upon the farm there was a pond fenced in a lot, known as the pond lot, at which pond the plaintiff's father had been in the habit of watering his stock up to the time of the difficulty hereinafter mentioned. On the day preceding the difficulty, the decedent forbade the plaintiff's father to water his stock at the pond, and his son drove back some stock which was attempted to be watered. On the day of the difficulty, the plaintiff's father, with the assistance of members of his family, including plaintiff, and with the aid of two other men, tried to take a cow by force to the pond to have her watered, and the decedent and his son resisted the attempt by force. In the scuffle which ensued, the decedent's son, with a club or part of a wagon shaft, felled the plaintiff's father and brother to the ground, and then ran, being pursued by the plaintiff's father and brother. The decedent, who was on the ground with a pistol strapped around his waist, then fired one shot at the plaintiff's father and brother, and then turned around and fired two additional shots at the plaintiff and her mother, who were standing behind him and about fifteen feet distant, the second of such shots taking effect in plaintiff's thigh and causing the injury sued for. As far as the plaintiff's evidence tended to show, and, in fact, as far as all the evidence went, *no personal violence was offered to the decedent prior to his beginning to fire, nor was any violence done him, until after he had shot the plaintiff*, nor was there any evidence, when the testimony hereinafter

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mentioned was admitted, as to whether plaintiff's father had a legal right to water his stock in the pond, the only evidence on that subject, up to that time, being that the plaintiff's father had prior to, and up to the preceding day, watered his stock there, and that the decedent forbade his doing so.

This being the state of the case, the court, against the defendant's objection, admitted evidence touching the financial condition of the plaintiff and her family, and the defendant properly saved his exception. The court, against a similar objection, admitted evidence touching the defendant's financial condition, to which action of the court the defendant saved no exception.

That in all cases, wherein the recovery of exemplary damages is justified, the defendant's financial condition may be given in evidence is not controverted. Exemplary damages are not given by way of compensation, but for the purpose of inflicting punishment on the defendant, and the defendant's ability to pay becomes a material inquiry. Strange to say this doctrine finds no application whatever in criminal procedure, but is confined strictly to civil procedure possessing criminal elements. With the logic of the rule we have nothing to do; it suffices for us that the rule exists, and is unquestioned in this state. The defendant, however, claims that the plaintiff's financial condition, and that of members of her family, was wholly irrelevant to any issue, regardless of the question, whether or not the case was one for exemplary damages, and that the admission of such evidence was highly prejudicial to the defendant in enlisting the prejudices and sympathies of the jury in the behalf of the plaintiff. We concede that the admission of evidence touching plaintiff's financial condition in an action for injuries to the person is logically still less defensible than evidence of the defendant's financial condition; yet it has been expressly decided in *Dailey v. Houston*, 58 Mo. 368, that in such

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an action "the condition in life of the plaintiffs and their pursuits and the nature of their business" might be considered by the jury in estimating the damages. That case has never been expressly overruled in this state, and, as it is a controlling decision of the supreme court on this subject, it is binding on us and the trial court alike. We have not overlooked the fact that in *Stephens v. Railroad*, 96 Mo. 214, the supreme court held that evidence as to the number of plaintiff's children is inadmissible in an action for injuries to his person, *when there is nothing in the case to justify the giving of exemplary damages*, and that proof of the plaintiff's financial condition was equally inadmissible in such cases; but the remark is carefully confined to cases where the action is one for compensatory damages only, and the case of *Dailey v. Houston* is not even alluded to.

Under these circumstances, we cannot put the trial court in the wrong for admitting this evidence because, when it was admitted, the facts of the case unquestionably justified the submission of the case to the jury, as one warranting exemplary damages. Beyond this, however, the following facts are entitled to consideration. It appeared *aliunde* from a mass of testimony, wholly unobjected to, that the plaintiff was a minor sixteen years old living with her parents, who had a large family of children, all engaged in work as tenants of the defendant in cultivating a small portion of his farm. The plaintiff presumptively had no financial condition, and the financial condition of her parents presumptively was of the humblest kind. That the court admitted evidence in aid of this presumption can at best be merely considered cumulative evidence, the admission of which, even if erroneous, would not justify the reversal of the judgment as for prejudicial error.

Almost every other objection of the defendant to the admission of evidence relates to the admission of evidence on cross-examination of defendant's witnesses,

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and while much of the evidence thus admitted was irrelevant, its admission, considering the latitude which is permitted in the cross-examination of witnesses, could not even be considered error, much less prejudicial error.

The verdict, as above seen, was for seven hundred and fifty dollars. The testimony of the plaintiff tended to show that the wound was inflicted by a ball passing from a rifled revolver in a rotary motion through her thigh close to the femoral artery; that the wound, although only a flesh wound, was painful; that the plaintiff was in a critical condition for several days, and was confined to her bed for weeks, and that, even at the date of the trial, which was seven months after the wound was inflicted, she could not use her leg for any length of time without pain, and that the wound was still open and had not healed. The probability of a permanent or at least continuous injury was made by the evidence a proper element for the consideration of the jury. There is, therefore, nothing in the amount of the recovery, which would justify us in vacating the verdict on account of excess, even if the plaintiff were limited to strictly compensatory damages, as there is nothing to show that the amount awarded was excessive, as a mere compensation. On the other hand we cannot accede to the view which has been strongly pressed upon our consideration, that, in determining whether the case is one for exemplary damages, we ought to take into consideration what the defendant's testimony tended to show. The credibility of witnesses is a question for the jury and not for us, and before we can disregard the finding of the jury as one opposed to the weight of evidence, we must be at least clearly satisfied that it was the result of prejudice. If the defendant's possession was invaded, he was justified in using necessary force in repelling it, but we cannot see how that could possibly justify him in deliberately using a deadly

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weapon on the mother and daughter, who, as all the testimony shows, were unarmed.

These views lead to an affirmance of the judgment, and, with the concurrence of Judge THOMPSON, it is affirmed. Judge BIGGS, who dissents, is of opinion that this decision is opposed to the decisions of the supreme court in *Overholt v. Vieths*, 93 Mo. 422, and *Stephens v. Railroad*, 96 Mo. 207. It is, therefore, ordered that the case be certified to the supreme court for final determination under section 6 of the amendment of the constitution relating to the judicial department.

BIGGS, J., delivered the following dissenting opinion.

I cannot agree to the disposition made of this appeal by my learned associates. I am of the opinion that the trial court committed prejudicial error in the admission of evidence, and that, for this reason, the judgment ought not to be upheld. The fact that the defendant is dead, and that a reversal of the judgment would abate the action, should receive no consideration in the determination of the legal questions presented by the record.

I. My colleagues are of the opinion that, in a personal injury case, it is competent for the plaintiff to show his financial condition, provided it is a case in which the law would authorize the assessment of exemplary damages. I cannot yield my consent to this proposition. To my mind the principle is illogical and indefensible.

In an action for personal injuries, when the facts show that the injury complained of was inflicted wantonly and under aggravating circumstances, the financial condition of the defendant may be shown. This is permitted, not with the view of benefiting the injured party by increasing the amount of his damages, but for the purpose of inflicting punishment on the defendant

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by the award of exemplary damages, and of deterring others from a like violation of law. Under this view the financial condition of a defendant becomes a material question, for the reason that a judgment for exemplary damages in a given case might be entirely adequate as a punishment, if the defendant was a poor man, but would be absolutely inadequate, if the defendant was wealthy. But I am unable to conceive upon what principle of law the financial condition of the plaintiff can be made the proper subject of judicial inquiry. And I am at a much greater loss to know how this inquiry can be extended, as was done in this case, to the plaintiff's father and mother. Ought the fact, that the injured party is poor, furnish any good and sufficient reason why he should receive a larger sum as compensatory damages than he otherwise would be entitled to? There can be but one answer to this question, and concerning which all of us are agreed. But my associates insist that, under the decisions of the supreme court, if the facts in a personal injury case authorize an award of exemplary damages, then the financial condition of the plaintiff may be proved. For what purpose? It cannot be possible that a defendant should be more severely punished for assaulting a poor man than a rich one? And is the offense rendered more odious in the eye of the law, and more deserving of punishment, from the fact that the immediate relations of the party assaulted are also poor? This must be true, if my associates are right.

Nothing is offered in support of this strange doctrine, except the case of *Dailey v. Houston*, 58 Mo. 261. In the *Dailey case* the court in passing on an objection to an instruction incidentally remarked that, in estimating the damages in a personal injury case, the jury might take into consideration the pecuniary condition of the parties, but no argument was submitted in support of the ruling, and the court simply declared it

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to be the law, citing the case of *Clements v. Maloney*, 55 Mo. 352, as authority for the proposition. The *Clements case* was an action for slander, and was no authority in an action for damages growing out of an assault. In a suit for slander the financial condition of the plaintiff may be inquired into and considered (*Polston v. See*, 54 Mo. 291), but the reasoning adopted by the court in support of the proposition is entirely inapplicable to actions for personal injuries. In the press and hurry of judicial work the court, in disposing of the *Dailey case*, evidently overlooked the distinction between the two classes of cases. However, if there were no other adjudication of the supreme court bearing on this question, I would be compelled to accept it as good law.

But I am of the opinion that this anomalous ruling has been repudiated by the more recent decisions of the court. In the case of *Overholt v. Vieths*, 93 Mo. 422, the court in discussing the question said: "During the examination of Mrs. Overholt, and after she had stated that she was the mother of the child, and a widow at the time of the accident; that she had one other child, a daughter, about fifteen years old; that she and her daughter did the housework; that she had no servant, and, at the time of the accident, she was engaged in housework, she was asked what her financial condition was; and, this being objected to by defendant as being immaterial, the objection was sustained and plaintiffs excepted. In view of what she had been allowed to state as to her condition in life, we are of the opinion that the objection was properly sustained. The court, in receiving her statements as to her circumstances and surroundings at the time the child was drowned, went as far as this court has gone in the case of *Winters v. Railroad*, 39 Mo. 468–475, and others to which we have been cited."

In the case of *Stephens v. Railroad*, 96 Mo. 207, the court said: "This evidence as to the number of his

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(plaintiff's) children was incompetent. It could have no bearing on the case whatever, lest it be to increase the amount of damages. There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained. *As well might proof be made of plaintiff's financial condition.* This we have held the plaintiff may not do, when the parent is suing for the death of a minor child. *Overholt v. Vieths*, 93 Mo. 422. Some countenance, it may be thought, is given for the admission of such evidence by what is said in *Conroy v. Iron Works*, 75 Mo. 652, and in *Winters v. Railroad*, 39 Mo. 475. In the case last cited, and upon which the other is based, the evidence as to the number of children had been withdrawn, and the remarks about the competency of the evidence were wholly unnecessary. Besides, there was no claim in that case, as here, that the damages were excessive."

The foregoing decisions indicate very clearly the mind of the supreme court, and I do not think that the majority of this court are justified in holding that the decisions quoted only modified the rule in *Dailey v. Houston*, so as to make it applicable to cases where exemplary damages are allowable. The language employed does not admit of any such limitation or restriction, and I cannot persuade myself that the court intended to declare any such doctrine. That the court would have expressly overruled *Dailey v. Houston*, if its attention had been called to it, admits of no doubt. It is a matter worthy of remark that the *Dailey case* has never been cited by counsel, or the supreme court, as authority on this question.

But the admission of this evidence is attempted to be justified because other evidence was admitted without objection that plaintiff's father was a renter, and that this was tantamount to proof that complainant was poor, and that, therefore, no harm was done. I cannot

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agree to this. It is competent, in this class of cases to show the avocation or business of the complainant, especially where the physical injury is permanent. Such evidence is admissible on the score of compensatory damages only. And while such testimony may indirectly indicate the financial standing of the complainant, yet it goes to the jury in such a way as not to prejudice the defendant. But, when the court admitted, against the defendant's objection, direct proof of the complainant's poverty, and also of that of her immediate relatives, the jurors might well conclude that they ought to consider such facts in determining the plaintiff's right of recovery.

II. The next assignment relates to the admission of evidence concerning the wealth of the defendant. The other judges are of the opinion that this objection is not available to the defendant, because the record fails to show that he saved an exception to this ruling. This is the rule, but at best it rests on very narrow and technical grounds, and should only be enforced when the adverse party insists on its application. It is the practice in the country, so far as my knowledge extends, to consider an exception saved to every adverse ruling of the court, and the failure to note an exception in the record would and ought to be regarded as a mere clerical omission. That was evidently the view taken of the question by the learned counsel representing the plaintiff, and this accounts for a failure on their part to make the point in this court.

As I have said before, such evidence would only be admissible in a case where the facts justified an award of exemplary damages. Our supreme court has declared that punitive damages are only authorized in personal injury cases, where the injury complained of was wantonly and cruelly inflicted in a spirit of hatred or ill will and without reasonable provocation. *Morgan v. Durfee*, 69 Mo. 469; *Clark v. Fairley*, 30 Mo. App. 335;

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McKeon v. Railroad, 42 Mo. 80; *Frantz v. Hilterbrand,* 45 Mo. 123; *Whalen v. Church,* 62 Mo. 326; *Owen v. Brockschmidt,* 54 Mo. 285. In other words, the facts and circumstances in evidence must show that the injury was inflicted maliciously, that is, with that wanton recklessness and disregard of the lives and safety of others, which could only emanate from a wicked and depraved heart.

The proper solution of the question necessarily leads to a review and discussion of the main facts in evidence, touching the origin of the difficulty, and the conduct of the parties just prior to, and cotemporaneous with, the shooting.

The shooting of the plaintiff by the defendant grew out of a difficulty between the Beck and Harris families. The defendant was seventy-six years old, and had been in very bad health for several months previous to the difficulty. He, and his son Nicholas, aged sixteen, lived on a farm, belonging to him, in Lewis county. He had rented a portion of his farm to Oliver Beck, Sr., the plaintiff's father, who lived with his family in a tenant house situated on the premises. This family consisted of Beck, his wife and five children, viz.: George, William, Oliver, Jennie and Myrtie. George and William were grown men; Jennie, the plaintiff, was sixteen years old; Oliver, fourteen, and Myrtie, twelve.

This difficulty occurred in August, and at the time there was a great scarcity of stock water on the farm, and the defendant had been driving his cattle for water to the Fabius river, which was in the neighborhood of the farm. On that portion of the farm which the defendant occupied, and over which Oliver Beck had no control or right of entry, the defendant had a pond of water, in what was known as the pond lot. This lot was separated from the other enclosures by fences and gates. The water in this pond was kept by defendant for his

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horse stock. On the morning preceding this difficulty, some of Beck's younger children had attempted to drive their father's cows through the defendant's premises, and into the pond lot, with the intention of watering them at the pond. They were prevented from doing so by the defendant. Previously to this, the defendant had declined to give Beck permission to water his cows at the pond, stating to him that he (defendant) drove his own cattle to the river, and that he wished to keep the water in the pond for his horses. The action of the defendant in forbidding the children to water the stock at the pond seems to have enraged their father, and, on the same day, he notified some of his confidential friends that he intended to water his cows at the pond, or he would have a "little war with defendant;" and he invited George and William Heinselman to accompany him home and remain all night, in order that they might witness the "battle" on the following morning. Oliver Beck and the defendant met in the morning, and Beck informed the defendant that he intended to water his cows at the pond, adding, "I'll take them down there, if I have to wade in blood up to my boots." The defendant replied: "You had better examine the law."

The defendant and his son both testified that, at the time when this conversation took place, George Beck had a revolver in his hand, Oliver Beck, Jr., had a horse pistol, and William Beck had a rifle. The defendant also testified that, at the time of the difficulty, which occurred shortly afterwards, Oliver Beck, Sr., struck him on the head with a slung shot. The plaintiff, her mother, her sister and her younger brother testified that their party had no pistols, but it is proper in this connection to state that neither the father nor two older brothers were called as witnesses. If Oliver Beck, Sr., had the right to water his stock at the pond, or if he and his party were not armed and did not

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threaten to force their way over the defendant's land, and did not intend, if it became necessary to accomplish their unlawful purpose, to use deadly weapons, then Oliver Beck ought to have denied these things on the witness stand, and the plaintiff's case would then have been relieved of some very ugly features. It is useless to argue that the plaintiff's case ought not to be prejudiced by anything that her father and brothers might have said or done; there is too much evidence in the case tending to show that the plaintiff was cognizant of her father's intentions, and actually participated in his unlawful and forcible trespass upon the defendant's property.

Immediately after the talk between Oliver Beck, Sr., and old man Harris, the former marshalled his forces and proceeded to the lot where his cows were kept, for the purpose of executing his previous threat. His company consisted of himself, George Beck, Oliver Beck, Jr., Myrtie Beck, George Heinselman and William Heinselman. There was an intervening enclosure (belonging to defendant) between the cow lot used by Beck and the pond lot, and into this enclosure the Beck party forced a cow, in spite of the protests and efforts of the defendant. The animal was led by a rope to the gate leading into the pond lot, and at this point the Beck company was reinforced by the plaintiff and her mother, and the defendant by his son Nicholas. The latter hitched his horse to the fence near the gate, and attempted to prevent the other party from forcing the cow through the gate. While this was going on, the plaintiff made the horse break loose, by which the fence was torn down, and during a scuffle that ensued between plaintiff and Nicholas the cow was gotten over the fence, and some of the Beck crowd started with her toward the pond. Nicholas went along with the crowd, and, in his efforts to prevent them from getting the animal to the pond, he got into a fight with Oliver

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Beck, Sr., and his son George. The plaintiff, George Heinselman, Mrs. Beck, Oliver Beck, Jr., and the defendant were following in the rear. This was the position of the parties when the real fight commenced.

The plaintiff's evidence tended to prove that Nicholas Harris struck at Myrtie (who was on horseback), with a stick, but missed her and hit the horse; that thereupon Oliver Beck and George Beck attacked him, both of whom he knocked down with the stick; that Nicholas then ran in the direction of his father with Oliver Beck and his son George in close pursuit; that, as they passed the defendant, the latter shot at or in the direction of Oliver and George; that, at the time this shot was fired, the plaintiff, her mother, the youngest boy and George Heinselman were standing immediately behind the defendant, and that he, after firing the first shot, turned and shot first at Mrs. Beck, and then at the plaintiff; that just as he fired the last shot, George Beck struck him with a club from behind, and knocked him down; that afterwards plaintiff's father knocked the defendant down and kicked him. The plaintiff testified that she did nothing to cause the defendant to shoot her, and in this she was corroborated by her mother, and Oliver, her youngest brother. The plaintiff also swore that she took no active part in the difficulty, except that she made Nick's horse break away, and that she then helped to get the cow through the fence.

The defendant's testimony tended to prove that the entire Beck family were actively engaged in committing the trespass, and that, before the fight at the pond, there was a difficulty between plaintiff and Nicholas at the gate, where the plaintiff made the horse pull the fence down; that, at the time the plaintiff struck Nicholas with a club, and during the scuffle between them, the cow was gotten through into the pond lot; that, when the crowd arrived at or near the pond,

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Myrtie undertook to run her horse over Nicholas, when he struck the animal on the nose with a stick; that immediately Oliver Beck, Sr., and his son George rushed at Nicholas; that the latter knocked both of them down with the club, and then ran in the direction of his father, with both of his assailants in close pursuit. The defendant testified that, when the parties passed him, the Becks were very close onto his son, and for the purpose of attracting their attention from the pursuit, he fired his pistol into the air, and that, just as he did so, he was struck two or three blows on the head, from behind; that he immediately turned and fired twice; that he recognized Mrs. Beck, Jennie, Ollie and Myrtie Beck standing near him, and that the plaintiff and her mother had clubs in their hands; that he did not see them strike him, but there was no one else near enough to strike him; that, as he fired the last shot, some one struck him from behind with a club and knocked him down; that he was again knocked down, was beaten while he was down; and that Ollie Beck struck him on the head with a stone.

Cyrus Heinselman testified that the plaintiff told him, "that, if the wagon spoke she threw at Nicholas as he ran past her had gone a little lower, that she would have stopped him;" that the plaintiff and her mother told witness on the day of the difficulty that, while the defendant was firing at old man Beck and George, "they tapped him on the back to attract his attention so as he would not kill them." The testimony of this witness was contradicted by the plaintiff and Mrs. Beck. The statement, made by defendant as to the injuries received by him, was corroborated by the evidence of his physician.

The foregoing is a general statement of the main facts as I gather them from a voluminous record.

It must be admitted that the Beck family was guilty of a wilful, violent and premeditated trespass

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upon defendant's property; and the evidence leads irresistibly to the conclusion that the plaintiff was an active participant in its commission. It may be conceded that, under the evidence, it was a question for the jury whether the defendant had used more force than was actually necessary in attempting to repel the trespass on his property, but I cannot imagine upon what theory the conduct of the defendant is to be regarded as so reprehensible as to call for the assessment of exemplary damages. It may be that the dangers surrounding the defendant were not so great as to afford a complete justification for his act, yet the evidence shows that the shot was fired under very exciting, and, to the defendant, exasperating circumstances. We must judge the defendant's act in the light of his surroundings. He was an old man and unable physically to offer effectual resistance to the attacks of his adversaries. Oliver Beck, Sr., had in effect informed him that, if he resisted the threatened trespass, he would take his life. The defendant had reason to believe that the male members of the Beck family were armed, and, in addition to this, they had called in George and William Heinselman to assist them in their unlawful undertaking.

Under such circumstances, can it be said that the defendant did not have reason to fear that the Becks would take his life, or would do him or his son great bodily harm; can we go so far as to hold that the defendant acted maliciously, and that this case is a proper one for exemplary damages? I think not. In the case of *Pond v. The People*, 8 Mich. 150, the court had occasion to discuss this identical question as follows: "And a very limited knowledge of human nature is sufficient to inform us that, when men combine to do an injury to the person or property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at half-way measures, or to scan closely the dividing lines between felonies and misdemeanors.

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But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression; and a man who defends himself, his family or his property, under such circumstances, is justified in making as complete a defense as is necessary."

In *Hinchcliffe's case*, 1 Lewin's Rep. 161, upon an indictment for manslaughter, it appeared that the deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow. They exerted force and a scuffle ensued, in which the prisoner received a blow in the breast, whereupon she threw a stone at the deceased and he fell and was taken up dead. HOLROYD, J., said: "The case fails on two accounts, it is not proved that death was caused by the blow, and, if it had been, it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing."

In the case of *Morgan v. Durfee*, *suprà*, SHERWOOD, J., said "Durfee had the unquestionable right to defend his office from ruthless intrusion, and his person against a battery then being inflicted, as well as threatened death. His right was, therefore, of a twofold nature, defense of his habitation and defense of his person; and as coincident with that twofold right he was invested by the first law of nature with authority to employ all the means within his reach, all the energies under his control, which the apparent necessity demanded, to expel the unwelcome and turbulent intruder, and protect himself against the murderous intentions of a desperate and dangerous man."

Under these decisions how can it be maintained that the defendant ought to be punished for resisting this armed invasion of his premises? It may be true that

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he was not fully justified in making use of the pistol, yet the act was done under very exciting and aggravating circumstances, and the law will, and ought at least to, so far excuse the act as to relieve the defendant from punishment by way of exemplary damages.

It may be said, that this testimony was admitted upon the theory that the facts, when fully developed, would show a case for exemplary damages, and that, if it should subsequently appear that there were no aggravating circumstances attending the act and conduct of the defendant in the infliction of the injury, then the evidence would be withdrawn, and that, in the absence of any instructions, it must be presumed that the court corrected the error by withdrawing the objectionable evidence from the consideration of the jury. All proper presumptions will be made in favor of the correctness of judgments of courts of record, and, when the record sent to an appellate court does not contain the instructions given and refused, the presumption will be that the court properly directed the jury; but such presumption must be limited to declarations of law applicable to the issues as made by the pleadings. If this limitation is not to prevail, then, in the absence of instructions, all objections in respect of the admission of incompetent evidence would go for nothing, for the very simple reason that the appellate courts would be authorized to assume that the trial courts finally corrected the errors by withdrawing the illegal evidence from the consideration of the jury.

As the admission of the evidence touching the financial condition of both plaintiff and defendant was erroneous, the only remaining question is, was the evidence prejudicial. The rule by which this question must be determined was stated by this court in *Clark v. Fairley*, 30 Mo. App. 335, as follows: "Error is presumed to be prejudicial. To justify an appellate court to affirm a judgment where error has intervened

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in the trial, the burden is upon the party claiming the benefit of the judgment to satisfy the appellate court that the error was not prejudicial." There is nothing in the record to throw very much light on the subject. The amount of the judgment would seem to indicate that the plaintiff was not prejudiced on the score of damages by the admission of the evidence, but there is nothing to exclude the idea that the verdict might have been produced, as was said in the *Fairley case*, "more by sympathy for the unfortunate sufferer, and by proof of the fact that the defendant was able to pay without serious inconvenience to himself, than by proper regard for the evidence touching the cause of the accident, which alone must determine the defendant's liability."

If the plaintiff's right to recover compensatory damages were perfectly clear and free from doubt, then I could probably agree with my associates that the errors complained of were not prejudicial; but I am of the opinion that the weight of the evidence was with the defendant, and that the incompetent evidence turned the scale against him.

III. The defendant offered to prove that, immediately after he was knocked down, George Beck went to the barn where the defendant's son was concealed, and shot at him with a pistol. The court excluded the evidence, and the defendant's counsel assign this action of the court for error. This evidence was material as having a tendency to show that the Beck party was armed, and that they intended to make use of violent means to accomplish their unlawful purpose, and it was admissible as part of the *res gestæ*.

I am clearly of the opinion that the judgment in this case ought to be reversed, and that the decision of the majority of the court is contrary to the decisions of the supreme court in the case of *Overholt v. Vieths*, 93 Mo. 422, and *Stephens v. Railroad*, 96 Mo. 207.

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STATE OF MISSOURI *ex rel.* JAMES C. HARRAH *et al.*, Relators, v. GEO. W. CAUTHORN *et al.*, Justices Daviess County Court, Respondents.

Kansas City Court of Appeals, March 31, 1890.

1. **Certiorari**: OFFICE OF: *Certiorari* only brings up the record of the inferior court, and its office is to reach only such defects or errors in the proceedings as appear upon the face of the record.
2. ——: COUNTY COURTS: BILL OF EXCEPTIONS. There is no provision of law providing for a bill of exceptions in the county courts, and so a *certiorari* can only reach the record proper thereof.
3. **County Courts**: JURISDICTION: DRAMSHOP LICENSE. A petition for a dramshop license need not, in order to confer jurisdiction on the county court, aver in the language of the statute that the petitioners compose a majority of the assessed taxpaying citizens, etc. If such jurisdictional facts are made to appear in other parts of the record, it is sufficient to give jurisdiction and render its action valid. (*Distinguishing State ex rel. v. Heege*, 37 Mo. App. 338.)

Certiorari to the Daviess County Court.

AFFIRMED.

Hall and *Gillihan & Brosius*, for the appellants.

(1) The petition in this case does not contain the very necessary allegation that the petitioners are assessed. The motion of the remonstrators to dismiss the petition ought to have been sustained. It was decided in the case of *State ex rel. Campbell v. Heege*, 37 Mo. App. 338, that these words in a dramshop petition were jurisdictional words, and that, unless the petition contained these words, the county court had no jurisdiction to act on the petition. *Railroad v. Young*, 96 Mo. 39; *Blize v. Castlio*, 8 Mo. App. 290; *Schaffer v. St. Louis*, 31 Mo. 200; *Schell v. Leland*,

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45 Mo. 289; *Jefferson Co. v. Cowan*, 54 Mo. 234; *Haggard v. Railroad*, 62 Mo. 302; *People v. Board of Police*, 72 N. Y. 415; s. c., 39 N. Y. 505; *People v. Smith*, 45 N. Y. 777; *People v. Woygant*, 14 Hun. 546; *Williams v. People*, 24 N. Y. 399; *Berry v. Lowe*, 10 Mich. 9; *Hyde v. Nelson*, 10 Mich. 357; *State ex rel. v. Police Commissioners*, 14 Mo. App. 297.

G. A. Chapman and *Callison & De Vorss*, for the respondents.

(1) The relators insist that the petition in the case fails to allege that the signers are "assessed taxpaying citizens." In so many words it fails in the caption or body of the petition to so state, but it does describe the petitioners as "taxpayers." Which, we aver, is the equivalent, though not clothed in the exact language of the statute. For the purpose of a petition of this character, there can be no legal distinction between the phrase "assessed taxpaying citizens" and "taxpayers." It is a distinction without a difference, and the supreme court in construing this section of the statute uses the phrase "assessed taxpayers" as synonymous with that of "assessed taxpaying citizens." *State ex rel. v. Meyers*, 80 Mo. 601-8; *Sutherland v. Holmes*, 28 Mo. 329. (2) But we controvert the doctrine of the relators "that these words (assessed taxpaying citizens) in a dramshop petition are jurisdictional words, and unless the petition contains them the county court had no jurisdiction to act on the petition," and hence the county court rightfully overruled relators' motion to dismiss. *Snoddy v. County of Pettis*, 45 Mo. 361; *Whitty v. Platte County*, 73 Mo. 30; *Zimmerman v. Snowden*, 88 Mo. 218.

Ellison, J.—On petition of the relators we ordered a writ of *certiorari* directed to the county court of Daviess county to bring up the record of that court in

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the matter of the application of W. J. Gillihan for a dramshop license in the town of Jamesport, a town of less than twenty-five hundred inhabitants, as well as the remonstrance thereto. That record is now before us. It includes the original papers in the cause as well as a transcript of the record proceedings of the county court. There is likewise returned among said papers what purports to be a bill of exceptions taken to the action of the county court in its various rulings and orders made in the progress of the proceedings.

Besides challenging the jurisdiction of the county court for the reason that it is not shown by the petition, relators raised several points against the action of the county court which have been saved by the bill of exceptions. A consideration, therefore, of the scope of this writ, as applicable to the present case, will dispose of all questions presented on the exceptions.

Certiorari only brings up the record of the inferior court and its office is to reach only such defects or errors in the proceedings as appear upon the face of the record. *Hannibal & St. Joseph Ry. Co. v. State Board*, 64 Mo. 294; *State ex rel. v. Powers*, 68 Mo. 320; *State ex rel. v. City of Kansas*, 89 Mo. 34. It is true that in some cases (whether of the class before us need not be said) a bill of exceptions may preserve proceedings otherwise not of record and make them a part thereof. But when there is no provision for a bill of exceptions the record proper is all that can be reached by this writ. *Lacy v. Williams*, 27 Mo. 280; *The County of St. Louis v. Lind*, 42 Mo. 348; *City of St. Joseph v. Davenport*, 55 Mo. 572. We know of no provision of law providing for a bill of exceptions in the county courts of this state and shall, therefore, disregard the paper presented here as such.

The case is then left standing on the record proper, and the only question for our consideration is whether such record shows jurisdiction in the county court. It

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will readily be seen from the foregoing, and the very nature of the case, that it is not our province to ascertain whether the county court, in granting license to the applicant acted properly or improperly, wisely or unwisely, but only to determine from the record if it had authority to act at all.

The contention on the part of the relators is that the petition, or, at least, the application accompanying the petition (and which, for this purpose, might be regarded as a part of the petition) should state in the language of section 4576, Revised Statutes, 1889, that petitioners compose a majority of the assessed tax-paying citizens of the town of Jamesport, and of the block or square in which the dramshop is to be kept. That without such statement in the petition the county court had no jurisdiction in the premises, and its license to the applicant is void.

This case is not one affecting the property or private rights of any one; but, conceding, nevertheless, to relators' position, that it is properly put in that class of cases which requires that the face of the record of inferior tribunals should show jurisdiction of the court in order that its action may be valid, we find that in none of the adjudications, with an exception hereinafter noticed, it is required that any one particular portion of the record should show such jurisdiction. It is in every way sufficient if any part of the record proper recites the necessary requisites to give jurisdiction to the tribunal before which the proceedings are had. *Iba v. Railroad*, 45 Mo. 469; *Gibson v. Vaughn*, 61 Mo. 418; *Jefferson v. Cowan*, 54 Mo. 234; *Whitely v. Platte Co.*, 73 Mo. 30; *Zimmerman v. Snowden*, 88 Mo. 218. This is held in double-damage cases against railway companies before justices of the peace who have jurisdiction of such cases when the injury occurred in the justice's township or some adjoining township. It is likewise held in road cases before the county courts.

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The case of *Gibson v. Vaughn, supra*, arose in the probate court, the record of which did not show notice to the administrator in the allowance of a demand, and the court decided that "the failure of *some portion* of the record to show jurisdiction is necessarily fatal." The case of *Zimmerman v. Snowden, supra*, was a petition for a public road where the petition must be made by twelve householders of the township in which the road is desired, three of whom shall be of the immediate neighborhood, and the court did not hold that the petition itself should state that it was by twelve householders, etc., but that it was necessary that these jurisdictional facts should "be made to appear upon the record *somewhere*."

The language of the statute as to a petition for a dramshop and a petition for a public road in neither case provides what the petition shall say as to the qualification of the petitioners, but in each case the requisite is that the petition shall be *signed* by a certain class of petitioners. As to roads, it has been directly decided that the petition need not on its face disclose the character or qualification of the petitioners. *Snoddy v. Pettis Co.*, 45 Mo. 361; *Fisher v. Davis*, 27 Mo. App. 321. These cases will apply with equal force to dramshop petitions. Where a statute requires a statement of the qualification or character of the petitioners to be stated in the petition, or any particular part of the record, it must be so stated in order to give jurisdiction, but, in the absence of such requirement, we are clearly of the opinion that necessary jurisdictional facts need not be stated in the petition, if they be made to appear in other parts of the record.

The case referred to above as an apparent exception to the current of authority is *State ex rel. Campbell v. Heege*, from the St. Louis Court of Appeals, 37 Mo. App. 338. There it does appear that the court puts the decision on the absence of jurisdictional facts in the

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petition, but it must be borne in mind that in that case the necessary jurisdictional facts did not appear in any other part of the record, and when such is the case a like absence of such facts from the petition will, of course, fail to confer jurisdiction.

Coming now to the records in this case, we find that, while the petition omits the averments referred to, the order granting the license is full and complete, and does recite all the necessary jurisdictional facts which are complained of as being absent from the petition, and we must, therefore, hold that, from the record of the proceedings before the county court, it does affirmatively appear that it had jurisdiction.

As stated above, it is not our province under this writ to inquire into the propriety of the county court's action during the investigation, or whether it properly determined the case from the evidence, but only whether it had the power to determine it at all. The result is that the judgment of the county court should be affirmed, and it is so ordered. The other judges concur in this opinion.

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J. E. Mohney, Respondent, v. James I. Reed, Appellant.

Kansas City Court of Appeals, March 3, 1890.

Rehearing denied, March 31, 1890.

1. **Waiver:** PLEADING: REPLY. When a petition upon a written contract alleges specific performance of the conditions and obligations on the part of plaintiff, there can be no recovery upon a waiver not pleaded; nor can such waiver, on denial of performance in the answer, be set up in the reply, as the denial makes the issue complete, and the waiver is inconsistent with the allegation of performance in the petition. nor can such allegation in the reply cure the defect of the petition.

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2. **Quantum Meruit:** ACTION ON CONTRACT CHANGED TO. On an examination of the evidence the court is confident plaintiff's action should be *quantum meruit.*

On rehearing.

3. **Contract:** INDUCEMENT: QUANTUM MERUIT. On a further examination the court is confirmed in the opinion that this action is on a written contract for building a house and not upon *quantum meruit,* and that the contract is not pleaded as an inducement to another action.

4. **Waiver:** PLEADING SCIENTER. In order to constitute a waiver there must be knowledge of the true situation, and, in pleading a waiver, there should be an allegation that, knowing the contract had not been performed, the defendant accepted, etc.

5. ——: BUILDING CONTRACT: ACCEPTANCE: KNOWLEDGE. In building contracts, where the house is built upon the property of him who has it built, acceptance and use of the work, knowing it was not done in accordance with the contract, is not a waiver.

6. **Pleading:** WAIVER OF PERFORMANCE V. WAIVER OF DAMAGES. The fact that the reply only pleads a waiver of damages, and not a waiver of performances (if a fact), can make no difference, as the establishment of either will suffice.

Appeal from the Cass Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED AND REMANDED.

Statement by the court.

The first count of plaintiff's petition is as follows:

"Plaintiff complains and alleges:

"(1) That on the fifth day of September, A. D. 1887, at Cass county, Missouri, by contracts under their hands and seals, defendant contracted and agreed with plaintiff to pay plaintiff the sum of sixteen hundred dollars, upon its completion, for the erection of a two-story frame house with kitchen, on the farm of defendant, near Eight Mile, in said county, furnishing the material therefor, and to be erected upon the foundations to be made by defendant. A copy of which contract is herewith filed (the original being under the control of defendant), and made a part of this petition.

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"(2) That plaintiff has duly performed all the conditions thereof on his part except that, at instance of defendant, the porch roof was put on with tin at the cost of defendant, and that the flue in the kitchen part of said house, at the instance and request of defendant, was built through into the upper story of main building, and made smaller and longer, at a cost of two ($2.00) dollars extra. And that at the instance and request of the defendant the painting of the house was changed from plain white to colors and trimmed in colors, at an extra cost of fifteen ($15.00) dollars, and for which changes defendant agreed to pay a reasonable sum in addition to the price named in the contract. And that at the instance of defendant the kind and quality of the flooring was changed from W. P. to all yellow pine and at additional cost to plaintiff of three and forty-five-hundredths dollars, and which defendant agreed to pay.

"(3) That the plaintiff on his part duly performed all the conditions of said contract as modified.

"(4) That the sum of twenty and forty-five-hundredths dollars is a reasonable payment to be made in addition to the price named in said contract for changes made at the instance of defendant in flue, painting and flooring aforesaid.

"(5) That defendant, by the terms of said contract, was to haul or deliver at place of building all materials and lumber used in erection of said house, and that defendant wholly failed and neglected, although requested at the time to do so, to haul or deliver the brick or the lumber and sand used in erection of his said house; that by reason of such failure of defendant to deliver or haul said brick and lumber plaintiff was compelled to expend, and did expend, for freight and hauling of brick from Harrisonville, in said county, twenty-five dollars, and for freight on lumber and sand the sums of twenty-eight dollars and thirteen and ninety-hundredths dollars, respectively.

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"(6) That defendant did not have foundations of said house ready until the sixth day of October, long after the time agreed in said contract. That plaintiff had said house entirely completed on the ninth day of December, 1887, and within the time agreed in said contract as extended by delay of defendant in not having foundation ready.

"(7) That defendant has paid plaintiff fourteen hundred, forty-nine and eighty-four hundredths ($1,449.84) dollars on said contract as modified as aforesaid, and accepted said house thereunder, and has occupied it since its completion.

"(8) That on the —— day of December, 1887, plaintiff demanded payment of defendant, the sum of $237.51, the sum due him as balance for completion of said house under said contract and as modified, and damages and beside extras.

"(9) Wherefore plaintiff asks judgment for balance due on said contract as modified, and damages thereon, the sum of $237.51 with interest from date of demand as aforesaid."

Defendant's amended answer is as follows:

"Said defendant for his amended answer to the petition of plaintiff heretofore filed herein denies each and every allegation contained in each of the said counts of said petition, except such as are herein specifically admitted to be true.

"Defendant admits that he made and entered into an agreement or contract with plaintiff at about the time set forth in said petition, by the terms of which he agreed to pay plaintiff the sum of sixteen hundred dollars for building a house and kitchen for defendant at the place, in the time and manner and with the materials in certain specifications and plans described and set forth, which said specifications and plans were attached and made a part of said contract and agreement. That he has paid thereon the sum of $1,485.43.

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"For another and further defense to the claim of plaintiff as set forth in petition, said defendant states that plaintiff, in said agreement, bound himself and promised to erect and build a house for said defendant as per specifications attached to said agreement and made a part thereof; and that all work upon and about said house was to be done in a good, workmanlike manner and within the time therein specified; and all materials in said building were to be such as were mentioned and described in the attached specifications. That the said plaintiff failed, neglected and refused to perform the conditions in his said contract. That he failed, neglected and refused to furnish the materials used in the construction of said building of the kind and grade specified in said contract; but instead thereof furnished materials therefor greatly inferior in kind, quality and grade to those required and specified in the contract aforesaid. That said plaintiff further failed, neglected and refused to comply with his said contract in this: That he failed, neglected to perform the work in building said house in a skilful and workmanlike manner; but, on the contrary, did his work thereon in very defective and unskilful manner. That the said defendant, by reason of the failure of said plaintiff to comply with his contract as aforesaid, has been and is now damaged as follows, to-wit: (1) By reason of the inferior workmanship, unskilful and defective manner in which said work is done on house, exclusive of painting and stairway, is damaged in the sum of two hundred dollars. (2) By reason of the inferior flooring furnished and used in construction of said house, he is damaged in the sum of $40.80. (3) By reason of inferior shingles, $20.80. (4) By reason of inferior studding, ten dollars. (5) By reason of inferior boxing ten dollars. (6) By reason of inferior siding furnished therein, $7.10. (7) By reason of an inferior grade of sheeting five dollars. (8) By reason of inferior lumber

and construction of stairway, fifty dollars. (9) By reason of an inferior grade of finishing lumber, $11.60. (10) By reason of an inferior quality and grade of material in scroll work, five dollars. (11) By reason of inferior and unfit joists, the same being placed too far apart, thirty dollars. (12) By reason of inferior and defective flues, eighteen dollars. (13) By reason of improper construction of twenty-two windows, and material therein, twenty-two dollars. (14) By reason of inferior material in doors therein, ten dollars. By reason of inferior paint and painting, fifty dollars.

"Said defendant says that the total damages by reason of the failure of said plaintiff to comply with his part of said contract as set forth in said contract and specifications is, and was, the sum of $490.30; which he asks the court to allow as a set-off or counter-claim against any sum, if any, which may be shown to be due to plaintiff on the trial of this cause. Said defendant further says that in all the items above mentioned he has suffered damages by reason of the fact that plaintiff failed and neglected to comply with his said contract; and furnished him with defective and unfit lumber in the construction of said building and did the work in an unskilful and unworkmanlike manner; and that the above sums are the damages which he has actually sustained thereby; for which defendant prays judgment and for his costs, and all proper relief."

Plaintiff's reply is as follows:

"For reply to the amended answer of defendant plaintiff denies each and every allegation in said answer contained and asks judgment as in petition is prayed.

"For further and other reply to the counter-claims and set-offs averred in said amended answer plaintiff avers that said house was erected upon stone foundation as is averred in said petition and is, and was at completion of said house, a permanent fixture of and on the land of the defendant, and that defendant was, during

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the erection of said house, and the delivery of the lumber and materials that were used in its erection, about the same and saw and knew at the time the character, kind and quality of all said lumber and materials, and of the work and labor done in the erection of said house or any work therein, and directed the workmen, and if any changes were had or made in the character of the work done on said house they were had and made with the approval of the defendant, and he assented thereto and waived any damages therefrom. And if any of the materials or lumber was different from that specified in the contract it was seen and inspected by the defendant and approved by him and was used with his knowledge and assent, and was better material.

"Whereupon plaintiff asks judgment as prayed in petition."

Bailey & Burney, for the appellant.

If plaintiff desired to rely upon a waiver he should have pleaded it in his petition. A statement of a fact in the reply, which ought to have been stated in the petition, does not cure the defect, and is insufficient. Defendant's motion, therefore, to strike out that portion of the reply upon the subject of waiver, and to strike out the evidence introduced by plaintiff upon that subject should have been sustained. Pomeroy on Rem. & Rem. Rights [2 Ed.] sec. 579; Bliss on Code Pleading, sec. 396; Gould's Pleading, chap. 4, sec. 8, p. 173; Maxwell on Pleading and Practice, chap. 11, p. 80; *Durbin v. Fisk*, 16 Ohio St. 534–539; *Webb v. Bidwell*, 15 Minn. 479–485; *Tullis v. Orthwein*, 5 Minn. 377–381. (2) Where plaintiff sues upon the written contract, and alleges specific performance on his part, he cannot at the trial recover upon a waiver. *Pier v. Heinrichoffen*, 52 Mo. 335 and 336; *Bank v. Hatch*,

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78 Mo. 13-24; *Bank v. Westlake*, 21 Mo. App. 572; *Nichols, Shepard & Co. v. Larkin*, 79 Mo. 271.

Noah M. Given, for the respondent.

(1) The trial court properly refused to allow defendant to file motion to strike out part of plaintiff's reply, after plaintiff had concluded his evidence in chief. R. S. 3572; R. S. 3586. (2) Plaintiff's action is not upon a written contract. *Marsh v. Richards*, 26 Mo. 106; *Boyd v. Camp*, 31 Mo. 163; *Kelley v. Rowane*, 33 Mo. App. 440. (3) Defendant's amended answer admits plaintiff's right of action. McCary's Pleading, sec. 191; 1 Chitty's Pleading, 526, 532; Stephens' Pleading, 200, *et seq.;* Bliss on Code Pleading, sec. 340; *Wagner v. Ditte*, 2 Mo. App. 254; *Liebke v. Thomas*, 24 Mo. App. 27; *Hay v. Thorp*, 49 Mo. 142; *Jones v. Moore*, 42 Mo. 419; *Emery v. Railroad*, 77 Mo. 340; *Tarwater v. Railroad*, 42 Mo. 193; *Davis v. Brown*, 67 Mo. 313. (4) Defendant waived his right to damages. *Fox v. Pullman*, 16 Mo. App. 127-8; *Pickle v. Ass'n*, 10 Mo. App. 19; 80 Mo. 65; *Tureman v. Stephens*, 83 Mo. 218; *State ex rel. v. Holliday*, 61 Mo. 319; *Williams v. Porter*, 51 Mo. 443; *Lumber Co. v. Warner*, 93 Mo. 386; *Crawford v. Elliott*, 78 Mo. 499; *Stephens v. McKay*, 40 Mo. 224. The motions for new trial and in arrest were properly overruled. *Condy v. Railroad*, 13 Mo. App. 588; 85 Mo. 79; *Schield v. Waldron*, 13 Mo. App. 597; *Fender v. De Wald*, 14 Mo. App. 60; *Pearson v. Railroad*, 14 Mo. App. 580; *Gregory v. Chambers*, 78 Mo. 294; *McAfee v. Ryan*, 11 Mo. 365. The judgment is for the right party and should be affirmed. R. S. 3775; *Gordon v. Eans*, 97 Mo. 588; *Fitzgerald v. Barker*, 96 Mo. 661; *Valle v. Picton*, 91 Mo. 207; *Railroad v. Vivian*, 33 Mo. App. 590; *Bassett v. Glover*, 31 Mo. App. 150; *Blesse v. Blackburn*, 31 Mo. App. 268; *Imler v. Springfield*, 30 Mo. App. 674.

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ON MOTION FOR REHEARING.

Noah M. Given, for the motion.

(1) (*a*) Plaintiff, in his petition, pleaded that defendant accepted the house under the contract, which was a plea of waiver; (*b*) plaintiff's reply did not plead a waiver of failure to comply with the contract, but a waiver of damages; (*c*) defendant waived any mistake plaintiff may have made in not suing on *quantum meruit*, by pleading, asking instructions, and trying his case upon the theory that it was an action on *quantum meruit;* (*d*) defendant's answer asking damages in recoupment and counter-claim admitted plaintiff's right of action; (*e*) defendant waived his right to damages; (*f*) plaintiff's action is not upon a written contract; (*g*) the judgment below was for the right party, and should be affirmed. *Ins. Co. v. Kyle*, 11 Mo. 292; *Russell v. Ins. Co.*, 55 Mo. 585; *Shultz v. Ins. Co.*, 57 Mo. 550; *Rice v. Railroad*, 63 Mo. 321; *Okey v. Ins. Co.*, 29 Mo. App. 110; *Travis v. Ins. Co.*, 32 Mo. App. 207; *Minor v. Edwards*, 12 Mo. 137.

Bailey & Burney, contra.

(1) It is well settled in this state that when a petition upon a written contract alleges specific performance of the conditions and obligations on the part of plaintiff, there can be no recovery upon a waiver not pleaded. *Lanitz v. King*, 93 Mo. 513; *Nichols v. Larkin*, 79 Mo. 271; *Bank v. Hatch*, 78 Mo. 13; *Eyerman v. Cem. Ass'n*, 61 Mo. 490; *Warson v. McElroy*, 33 Mo. App. 554; *Bank v. Westlake*, 21 Mo. App. 572; *Lambert v. Palmer*, 29 Iowa, 104; *Cole v. Wintercost*, 12 Texas, 118; 2 Edwards, Bills and Notes [3 Ed.] sec. 949; *Garvey v. Fowler*, 4 Sand. 665; *Shultz v. Dupuy*, 3 Abb. Pr. 252; *Johnson County v. Lowe*, 72 Mo. 638, 639; *Murphy v. Sherman*, 25 Minn.

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196; *Woolsey v. Williams*, 34 Iowa, 413; Pomeroy's Rem. & Rem. Rights, sec. 556. (2) Waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. *Johnson Co. v. Lowe*, 72 Mo. 639; *Haysler v. Owen*, 61 Mo. 274; *Minor v. Edwards*, 12 Mo. 140, 141 and 142; *Hoxie v. Ins. Co.*, 32 Conn. 40; R. S. 1879, sec. 3511. "Every substantive fact, which the plaintiff must prove to maintain his action, should, under the practice act, be alleged." *Lanitz v. King*, 93 Mo. 519; *Nichols, Shepard & Co. v. Larkin*, 79 Mo. 271; *Bank v. Hatch*, 78 Mo. 24; *Pier v. Heinrichoffen*, 52 Mo. 335 and 336. (3) The allegation that defendant accepted said house thereunder, and has occupied it since its completion, is insufficient to constitute a waiver in an action on a building contract. *Johnson Co. v. Lowe*, 72 Mo. 638; *Haysler v. Owen*, 61 Mo. 274; *Eyerman v. Cem. Ass'n*, 61 Mo. 490, 491; *Yeats v. Ballentine*, 56 Mo. 538.

Ellison, J.—This action is stated in a petition declaring on a written contract for building defendant a house for a price therein specified. Plaintiff alleges that he duly performed all the conditions of the contract except as to the porch roof, the flue in the kitchen, the painting, and a portion of the flooring, which modifications or changes were made at defendant's request, and for which he agreed to pay. That the contract and its conditions he duly fulfilled as thus modified. There was a second count on an account for a sum amounting to $51.45.

The answer denied the conditions of the contract had been performed and set up damages by way of recoupment, on account, among other things, of plaintiff failing to furnish the kind and grade of material, and that he failed to perform the work in a skilful and workmanlike manner.

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The reply pleaded, among other things, that defendant waived any damage by reason of any of said matters of non-compliance alleged in the answer. Evidence was received as to waiver and instructions given in relation thereto. A trial resulted in a verdict for plaintiff and defendant appeals.

I. We are of the opinion that the matter of waiver either in the evidence or instructions should not have been permitted to make its appearance at the trial. It is a well-settled law in this state that, when a petition upon a written contract alleges specific performance of the conditions and obligations on the part of plaintiff, there can be no recovery upon a waiver not pleaded. *Lanitz v. King*, 93 Mo. 513; *Pier v. Heinrichoffen*, 52 Mo. 535; *First Nat. Bank v. Hatch*, 78 Mo. 13; *Nichols v. Larkin*, 79 Mo. 271. We apprehend the court permitted the matter of waiver to come into the case under the allegations in the replication which, as was stated, pleads a waiver. But we think it was not, in this case, proper matter for reply under the code. The statute, section 3524, Revised Statutes, 1879, is that, "where the answer contains new matter, the plaintiff shall reply to such new matter, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to the new matter in the answer." Now the petition in this case alleges a performance of the contract, and the answer does not set up any new matter as to this, but denies the allegation. The issue is thus complete. Again, the reply, under this statute, may set up, in defense of the new matter in the answer, any new matter not *inconsistent* with the petition. The petition alleges performance, but the reply, in effect, alleges non-performance, in that the performance was waived. This is not consistent with the allegation of the petition.

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If the petition had been on a *quantum meruit* and the answer had set up the contract and non-performance, this being new matter, the reply might consistently have met it with the plea of waiver. Such was the case of *Wolfe v. Howes*, 20 N. Y. 197.

So if the petition, being on the contract, had alleged the facts, that is to say, performance of all that was performed and waiver of all that was waived, it would have been proper to receive testimony of the waiver alleged. But an allegation in the reply which ought to have been made in the petition is not sufficient and does not cure the defect. Pomeroy on Rem. and Rem. Rights, sec. 579; Gould's Plead., chap. 4, sec. 8, p. 163; *Webb v. Bidwell*, 15 Minn. 479; *Durbin v. Fisk*, 16 Ohio St. 534.

II After an examination of the evidence before us we are confident plaintiff's action should be *quantum meruit.* Much of the difficulty surrounding the case now, results from the action being founded on the written contract. When such is the petition there can be no recovery on the *quantum meruit*, and as the judgment will be reversed plaintiff may have the opportunity to amend. Defendant, however, contends that an action on a specific contract cannot be changed by amendment to one on *quantum meruit.* This point was ruled otherwise in *Eyerman v. Mt. Sinai Cem. Ass'n*, 61 Mo. 492.

The foregoing disposition of this case renders it unnecessary to go into a detailed examination of the numerous exceptions taken by defendant at the trial.

The judgment, with the concurrence of all, is reversed and the cause remanded.

ON REHEARING.

Ellison, J.—A further examination of this case confirms us in the opinion that the action is on a written contract for building a house and not upon a *quantum meruit.* The authorities cited us by plaintiff

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appear to have no bearing on the question as it is presented on the petition here considered. It is true, as stated in *Boyd v. Camp*, 31 Mo. 163, that, if "a written contract is so varied by parol, or from any other cause an action cannot be maintained upon it, and it is made the inducement to another action, the whole matter is thrown into parol." But this is not applicable here, as this contract is not made "the inducement to another action," for no other action than one on the contract as modified is stated in the petition. And this is the correct pleading, when the facts bear it out. For when a written contract has merely been modified in some respects and has been performed as modified (as is alleged here) it is not thereby abrogated and the action should be on the contract as modified. *Lanitz v. King*, 93 Mo. 519.

It is contended that waiver of the performance of the contract was pleaded in the petition, and that the waiver pleaded in the reply was only a plea of waiver of damages for not performing the contract. That part of the petition claimed to have pleaded a waiver is as follows: "That defendant has paid fourteen hundred and forty-nine and eighty-four-hundredths ($1449.84) dollars on said contract as modified as aforesaid, and accepted said house thereunder, and has occupied it since its completion." In order to constitute a waiver there must exist knowledge of the true situation. The plaintiff must have accepted of a different thing or article to which he was entitled under his contract with a knowledge that it was different. To waive the performance of a contract he must have known it had not been performed. *Minor v. Edwards*, 12 Mo. 137. Now allowing the most that can be made out of this allegation and, for the moment, making no distinction as to building contracts, there should have been some allegation that defendant accepted the house as being built under the contract knowing the contract had not been performed in the things wherein it was not performed. *Johnson Co. v. Lowe*, 72 Mo. 638.

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But in building contracts where the house is built upon the property of him who has it built, acceptance and use of the work knowing it was not done in accordance with the contract is not a waiver. The owner is powerless to do anything else, unless he should pull the house down. *Haysler v. Owen*, 61 Mo. 273; *Eyerman v. Cem. Ass'n*, 61 Mo. 490; *Yeats v. Ballentine*, 56 Mo. 530. The latter case fully explains the peculiarity of such contracts.

But it is not necessary to discùss this matter when it is so clearly demonstrated by the petition itself that a waiver is not pleaded and was not intended to be. Throughout its length it iterates and reiterates a performance of the contract as modified. It tenders the issue, point blank, of performance. The single sentence now urged as being a plea of waiver, which implies non-performance, is preceded and succeeded by continuous reference to the contract which is alleged to have been performed.

As stated in the original opinion, the waiver is pleaded in the reply; but counsel now meet us with the assertion that the reply only pleads a waiver of damages; damages, of course, arising by reason of a breach of the contract. By this it must be meant that it requires two waivers to exonerate plaintiff, one a waiver of performance, and the other a waiver of damages for such non-performance. Thus plaintiff would take more upon himself than is necessary. If he establishes a waiver of performance we should be inclined to deny damage against him for non-performance. If he establishes a waiver of damages for non-performance we should be inclined to hold it a waiver of performance. As these propositions embrace exactly the same thing, the establishment of either will suffice.

It is further urged upon us that under a plea of performance a waiver may be proved. This has been so held by the supreme court and this court in insurance

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cases as is stated in *Lanitz v. King*, 93 Mo. 519, wherein the seeming inconsistency between such cases and other cases, before and since, are referred to. But the decisions, other than in insurance cases, are uniform in this state, that a waiver cannot be proved under a plea of performance.

We have given careful consideration to the points and authorities presented in respondent's briefs and have arrived at the conclusion that his case, as it now stands, is without merit, and, therefore, reverse the judgment and remand the cause. All concur.

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44 620

THE THIRD NATIONAL BANK OF SEDALIA, MISSOURI, Respondent, v. MONROE H. GARTON *et al.*, Appellants.

Kansas City Court of Appeals, February 17, 1890.

Rehearing denied, March 31, 1890.

1. **Attachment**: AFFIDAVIT FOR: AMENDMENT: JURISDICTION. An affidavit for attachment, filed in the cause, though in proper form otherwise, which is not signed by the alleged affiant, and the *jurat* is neither signed by the clerk nor attested by the seal of the court, is a nullity, and cannot be amended, and confers no jurisdiction to issue a writ of attachment.

On motion for rehearing.

2. ——: ——: ——: APPEARANCE. On motion for rehearing the majority of the court adhere to the original opinion and hold in addition that the fact of defendant's appearing and pleading to a subsequently filed affidavit does not waive the necessity of a proper affidavit in the inception of the attachment proceeding, which is a proceeding *in rem*, and the means provided by the statute must be pursued to bring into the jurisdiction of the court the *res*, the property of the defendant.

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Per Smith, P. J., dissenting:

3. ——: ——: ——: ——. The failure of the affiant to sign the affidavit, and the want of a *jurat* thereto, were not such an insufficiency as prevented the court from acquiring jurisdiction, and there was no error in permitting the affidavit to be amended as provided by the statute; and the defendants' plea in abatement waived the defects in the affidavit.

Appeal from the Johnson Circuit Court.—Hon. Chas. W. Sloan, Judge.

Reversed and remanded

Sam'l P. Sparks and *G. S. Hoss*, for appellants.

(1) The paper styled an affidavit for an attachment was a nullity because (1) it lacked the signature of the affiant, and (2) the *jurat* was unsigned. *Hargadine v. VanHorn*, 72 Mo. 370; *Burnett v. McCluey*, 78 Mo. 677, *loc. cit.* 689; *Bray v. McCluey*, 55 Mo. 128; *Owens v. Johns*, 59 Mo. 89. The motion to quash the writ of attachment was the proper procedure to raise the question. *Owens v. Johns, supra.* (2) The filing of an affidavit in compliance with the statutes was a *sine qua non* to the issuance of a valid writ of attachment, and the later to the jurisdiction in the court. R. S. 1879, sec. 402, p. 63; Drake on Attachment [5 Ed.] sec. 84; *Hardin v. Lee*, 51 Mo. 241, and authorities there cited; *Cooper v. Reynolds*, 10 Wall. 303; *Owens v. Johns, supra.* (3) That which is void is not amendable and *e converso. Owens v. Johns, supra; Hardin v. Lee, supra*, and authorities there cited; *Hargadine v. VanHorn, supra.* (*a*) It follows that the court erred in giving its sanction to the extra-judicial amendment by overruling the motion to quash the writ and the amended affidavit. Amendments cannot be made so as to supply jurisdictional facts when the record shows an absence of them. *Blize v. Castilio*, 8

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Mo. App. 290. (*b*) The court erred in admitting affidavits and depositions—evidence *de hors* the record, in support of the leave to amend. *Blize v. Castilio*, 8 Mo. App., *loc. cit.* 294; *Jones v. Hart*, 60 Mo. 346; *Hansbrough v. Fudge*, 80 Mo. 307. (*c*) The taking of the affidavit to Sedalia, and causing Parker and the clerk to sign the same before the notary taking their depositions, was extra-judicial and void, being in advance of any authorization by the court. (*d*) It was essential that the affidavit should have been entitled in the cause, it must be complete in itself. *Bray v. McCluey*, 56 Mo., *loc. cit.* 138; dissenting opinion of WAGNER, J.; *Arnold v. Nye*, 11 Mich. 457; 28 Cen. Law Jour. 261, 262. (*e*) The paper styled an affidavit upon which the writ was based contained none of the essentials of an affidavit. See leading articles entitled "Essentials of an affidavit," 28 Cen. Law Jour. 261, 262. (*f*) The affidavit, writ and return constitute a part of the judgment roll, and the motion in arrest reached the errors on their face.

Wm. S. Shirk with *Jackson & Montgomery*, for the respondent.

(1) The original affidavit, though not signed by the affiant, and having no *jurat* thereto, having actually been sworn to, was not a nullity. It was amendable. The omissions were not jurisdictional. R. S. 1889, sec. 568, being the same as statutes of 1879, sec. 445; *Henderson v. Drace*, 30 Mo. 362; *Musgrove v. Mott*, 90 Mo. 107 on 110; *Burnett v. McCluey*, 92 Mo. 230; Waples on Attachment, p. 83, and authorities cited on note 4, and page 104. (2) The depositions of Parker and Brady and the affidavit of Shirk show, beyond dispute, that Parker did swear that the causes for attachment, set out in the affidavit, existed, and the court, by over ruling the motion to quash, ratified the

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act of the said Parker in signing the affidavit, and of the clerk in signing the *jurat*, at the time of the taking of their depositions, and it was not error for them to do so. (3) There was no error in admitting the depositions and affidavit above mentioned, in support of respondent's application for leave to amend. The cases cited by appellant, viz.: *Blize v. Castilio*, 8 Mo. App. 294; *Jones v. Hart*, 60 Mo. 351, and *Hansbrough v. Fudge*, 80 Mo. 307, are not all in point. The omissions in the original affidavit were merely clerical omissions or mistakes, and not at all of the same nature as the amendments attempted in the above cases. (4) The affidavit was not only attached to the petition, but was written on the same sheet of paper with it, and, as to being entitled in the cause, it must be read in connection with the petition, and is in that respect sufficient. *Burnett v. McCluey*, 92 Mo., *loc. cit.* 235. (5) As soon after respondent discovered the omissions in the original affidavit, as it was possible for it to do so, it filed an an amended affidavit (see affidavit of Shaw, filed, June 13, 1887), and it might well have rested on this affidavit, without amending the original. It was not necessary to wait until the original affidavit was held insufficient, but had the right to amend in advance. *Musgrove v. Mott*, 90 Mo., *loc. cit.* 110. (6) Our statute does not in terms require the affidavit to be signed by the party who makes it. Hence, if it was actually sworn to, it is not a nullity. 1 Am. and Eng. Cy. Law, p. 311, title "Affidavits—signature," and authorities cited in note 3, among which are: *Haff v. Spicer*, 3 Paige (N. Y.) 190; *Melius v. Shafer*, 3 Denio, 60; *Hitsman v. Garrard*, 16 N. J. Law (1 Harr.) 124; *Bates v. Robinson*, 8 Iowa, 318, and many others; Waples on Attach., p. 83, and cases cited in note 4. (7) And the failure of the clerk to attach his *jurat* was not fatal to the affidavit, if he actually swore the party to it. *Kruse v. Wilson*, 79 Ill. 233; *Cook v. Jenkins*, 30 Iowa, 452;

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Simon v. Stelter, 25 Kansas, 155; Waples on Attach., p. 84, note 1. And upon clear proof that the affidavit was sworn to by the affiant, before a proper officer, the courts will permit it to be amended according to the fact. See above cases, and cases cited to point 2, *supra;* Waples on Attach., p. 84, note 2; p. 103, 104, 105, note 1; p. 106. (8) Defendants waived all objections to the sufficiency of the affidavit by filing a plea in abatement to it, and going to trial thereon. *Brayton v. Freeze*, 1 Indiana, 121; *Henderson v. Drace*, 30 Mo. 362, on 363–4.

Gill, J.—This is a suit by attachment, brought in the Pettis circuit court March 29, 1887; and at the May term following a change of venue was taken to the Johnson circuit court, where the cause was subsequently tried, and, judgment being rendered for plaintiff, defendants have appealed to this court. The matter at issue relates to the attachment proceedings in the cause.

On March 29, 1887, when the action was commenced, the plaintiff filed with the clerk of the Pettis circuit court the following paper, intending the same, evidently, as an affidavit for attachment. We copy the paper here:

"State of Missouri, }
"County of Pettis, } ss.

"Albert Parker, president of the Third National Bank of Sedalia, Missouri, being sworn for, and in behalf of, said bank, the plaintiff herein, on his oath says: That the plaintiff in the above entitled cause has a just demand against the defendants therein, which will become due on the eighteenth day of May, A. D. 1887, and that the amount which this affiant believes the plaintiff ought to recover, when the same becomes due, is two thousand dollars; and that this affiant has good reason to believe, and does believe, that the defendants have fraudulently conveyed and

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assigned their property and effects so as to hinder and delay their creditors, and that defendants are about fraudulently to convey and assign their property and effects so as to hinder and delay their creditors, and that defendants have fraudulently concealed, removed and disposed of their property and effects so as to hinder and delay their creditors, and are about fraudulently to conceal, remove and dispose of their property and effects so as to hinder and delay their creditors.

"Subscribed and sworn to before me this ——th day of March, A. D. 1887.

"Filed in the office of the clerk of the circuit court of Pettis county, Missouri, on the twenty-ninth day of March, 1887."

The transcript was filed in the Johnson county circuit court June 13, 1887, and, on the same day, V. E. Shaw, an attorney for the plaintiff, and in the plaintiff's behalf, made and filed an attachment affidavit (in lieu of the paper above quoted) and which, too, seems in proper form, signed and sworn to.

On October 20, 1887, defendants filed their motion to quash the writ of attachment issued on the twenty-ninth day of March, 1887, for the following reasons: *First.* Because at the time of the issuance of said writ of attachment there had been filed no affidavit setting forth the grounds of the attachment filed in this cause, as required by the statutes, and that said writ of attachment and attachment proceedings, by reason thereof, are null and void. *Second.* Because said attachment proceedings are null and void upon their face.

In opposition to this motion, plaintiff submitted the affidavits of Mr. Shirk, plaintiff's attorney, Albert Parker, president of the plaintiff corporation, and M. W. Brady, the deputy clerk of the Pettis circuit

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court—all tending to show that said Parker was sworn to the paper, heretofore copied, at the institution of the suit, and that, by mistake or oversight, Parker neglected to affix his signature thereto, and the clerk, for the like reason, neglected to sign the *jurat* and affix the court's seal. And thereupon the said Parker did affix his signature to said paper as the affiant, and Brady, as deputy clerk, signed the *jurat* annexed thereto. Whereupon the court overruled the motion to quash the writ of attachment, to which ruling defendants saved exceptions and now assign such action of the circuit court as error.

I. In calling for this extraordinary relief by attachment, whereby the power of the state is brought into action to seize on, and hold to, the assets of an alleged debtor until the creditor may, or may not, establish his claim, the law has imposed on him, seeking such aid in advance of a judgment in his favor, the giving a bond to secure defendant in case of wrongful attachment; and, further, to guard against indiscreet action as much as possible, the party asking the writ is required to file his affidavit (or the affidavit of some one for him) as to the nature and justice of his claim, as well as to allege therein the ground, or grounds, of attachment. It is, therefore, repeatedly, and very properly, held that this affidavit is an indispensable prerequisite to the issue of the writ of attachment. Without such affidavit, no court, or clerk thereof, has authority, or jurisdiction, to command, in the state's name, the seizure of a defendant's property. If, then, when the writ of attachment in this case was issued on March 29, 1887, there was not present, filed with the clerk, an affidavit for attachment, as the law requires, the issue thereof was wholly unwarranted, void and without jurisdiction, If, however, there was an affidavit, but defective, then it might be amended, and would support the writ.

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We have no hesitancy in saying that the paper filed with the petition in this cause was not an affidavit, defective or otherwise. Webster defines an affidavit as "a sworn statement in writing; a declaration or statement in writing signed and made upon oath before an authorized magistrate." "An affidavit," says BIGGS, J., in *Norman v. Horn*, 36 Mo. App. 419, "is a written statement or declaration sworn to before some officer authorized by law to administer oaths, and signed at the end by the affiant."

In *Hargadine v. VanHorn*, *supra*, NAPTON, J., speaking for our supreme court, uses this language: "In the present case there was no affidavit at all, that is, the paper described and referred to by the clerk as the one upon which the writ of attachment issued was not signed by any one, and was, therefore, no affidavit." It seems in the *Hargadine case* there was a *jurat* attached, signed by the officer administering the oath, and that Judges SHERWOOD and NORTON dissented. But even they, in a dissenting opinion, made no claim, or remark even, suggesting that such a paper as we have here could be deemed an affidavit. In his dissenting opinion, Judge SHERWOOD says: "It is the *official certificate* which gives authenticity to the written oath, and not the signature of the affiant." While, then, the entire court agreed to the necessity of the *jurat*, signed by the officer, three insisted on a like necessity of the *affiant's signature* to the paper to make an affidavit justifying an attachment.

In the case now under consideration the paper filed with the clerk as an affidavit for attachment is possessed of neither of the above requisites, It is signed by no affiant, nor authenticated by any officer authorized to administer oaths. It is nothing more, in effect, than a blank piece of paper wanting in every ingredient characterizing an affidavit. And, whatever may be the opinion of the minority in the *Hargadine case*, the majority of the court then held that a paper

assuming to be an attachment affidavit, but unsigned by the affiant, is no affidavit, and this ruling has not, to our knowledge, ever been overruled. The conflict arising from the decision in *Burnett v. McCluey*, 92 Mo. 230, is not upon this point. The affidavit in controversy there is the same dealt with in *Bray v. McCluey*, 55 Mo. 128, and in *Burnett v. McCluey*, 78 Mo. 676, and was simply that the attachment defendants were not residents of the state and such affidavit did not purport on its face to be an affidavit for attachment. It was held by a divided court, in the disposition of the two former cases, that the paper was not an affidavit for attachment; while in the ninety-second the court holds that it is an affidavit for attachment, and, though defective, was in a collateral proceeding sufficient to support a judgment. In no case, in this state or elsewhere, do we find that a mere blank paper, unsigned by the affiant and authenticated by any one authorized to administer oaths, was taken to fill the place of an attachment affidavit. Being, then, a mere nullity, the paper filed in this cause gave no authority to the clerk to issue the writ of attachment. And, being a nullity, there was nothing by which to amend, as was attempted in this case. *Owens v. Johns*, 59 Mo. 89; *Norman v. Horn*, 36 Mo. App. 419; *Hargadine v. VanHorn*, 72 Mo. 370; and cases cited, *supra*.

For the error, then, of the trial court in overruling the motion to quash the writ of attachment, the judgment is reversed and the cause remanded. All concur.

ON MOTION FOR REHEARING

GILL, J.—I. On a reconsideration of this case we see no reason to withdraw from the position already taken, and must adhere to our former holding, to the effect that no jurisdiction in the attachment ever attached by the issue of the writ herein, for the reason that no affidavit for attachment was filed prior to the

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issue of such writ, and that such writ was, therefore, void.

II. Plaintiff's counsel, however, insists, that, even to admit that the writ of attachment was issued in the absence of an affidavit, yet that defendants waived the necessity thereof by appearing and pleading to an affidavit, subsequently filed in the court. We cannot concur with counsel on the position thus taken. It is well understood that, in the matter of jurisdiction over the *person*, a defendant may appear in court and submit himself to the jurisdiction thereof in the face of defective, or even *void*, process; and that he cannot thereafter complain of such want of process, since he will be deemed to have waived the necessity thereof. However this rule has no application here, in a proceeding in its nature *in rem*—where the court seeks by its process to bring the thing in court, with the purpose of subjecting such thing to the payment of plaintiff's claim. It is an extraordinary process, and the statute law has provided a means whereby the *res* may be brought into the jurisdiction of the court. The presence or absence of the *defendant* in the suit has nothing to do with the presence or absence of the attached property. In other words the defendant may be present and yet the defendant's *property* absent, or not within the court's jurisdiction. *Johnson v. Gilkeson*, 81 Mo. 59. For example, a suit may be pending against a defendant who has been brought in by process, or who has appeared voluntarily and without process, yet if an attachment against his property is sought, in aid of such suit, the same affidavit is required to warrant the court in issuing the attachment writ, as if sued out in the beginning of the litigation. R. S. 1889, sec. 533. The presence of an attachment affidavit is made an *absolute*, *indispensable* prerequisite to the court's *jurisdiction* to issue the writ. "The issue of the writ of attachment is a movement in

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the exercise of jurisdiction; and there is *no lawful right to make* that movement, unless such ground be laid therefor, by affidavit, as the law prescribes. If there be no affidavit then the writ of attachment is *coram non judice* and void." Drake on Attachment [6 Ed.] sec. 89, *et seq.;* Waples on Att., pp. 76, 77. "No court has any jurisdictional right to issue the writ of attachment unless the statutory requirements be complied with, and where there are fatal defects in the affidavit (so that it amounts to no affidavit) then the attachment thereunder is void *ab initio.* The whole proceedings are not merely *voidable* but absolutely *void.* Waples on Proceedings in Rem., sec. 587, *et seq.;* secs. 595 and 86. "Jurisdiction over the subject-matter in attachment cases is *obtained only* by the levy thereon of a writ properly issued." *Hardin v. Lee*, 51 Mo. 244.

In our opinion then the writ of attachment, issued in this cause, was an attempted process without *jurisdiction.* The court did not thereby acquire jurisdiction over the subject-matter. It was a void proceeding from the beginning, and, as jurisdiction never attached, advantage thereof could be taken at any time. *Henderson v. Henderson*, 55 Mo. 534. And since the court never acquired, under the law, jurisdiction of the subject-matter, consent of parties cannot confer jurisdiction. *Bray v. Marshall*, 66 Mo. 122; *Baker v. Railroad*, 36 Mo. 543; *Fields v. Mohey*, 78 Mo. 176.

Ellison, J., concurring, the motion for a rehearing is, therefore, denied.

Smith, P. J. (*dissenting*).—I. Although I concurred in the opinion in this case, as is therein stated, I have become satisfied by further examination and reflection, that I erred in so doing, and I shall make this the occasion for changing my front in respect thereto, and for stating the reasons which have induced the change of conviction.

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It will be observed from the statement of the case that the affidavit for attachment and the certificate of the clerk, appended to the plaintiff's petition, are unexceptionable, except that the name of the affiant was not signed to the affidavit, nor that of the clerk to his certificate. It was held by us that these omissions were fatal to the proceedings. As was said by Judge SHERWOOD in the dissenting opinion in *Hargadine v. VanHorn*, 72 Mo. 370, that the component parts of an affidavit are: *First*, the written oath; *second*, the signature of the deponent, and, *third*, the attestation of the administering of the oath by the officer, who did administer it. According to this definition, if either one of these component parts be lacking, the affidavit is incomplete. In this case, the first part of the affidavit, the written oath, is not lacking, but the other two parts thereof—the signature of the affiant and the attestation of the clerk, are wanting.

The question now is, whether this triparted affidavit for the attachment, with two specified parts thereof omitted, was a proper subject of amendment in the circuit court upon the application of the plaintiff for that purpose. It seems to me that the action of the court in allowing the amendment to be made was fully authorized by the statute — section 445 — which provides that attachments in courts of record may be dissolved on motion made on behalf of the defendant at any time before final judgment in the following cases: *First*. "When the affidavit upon which the same is founded shall be adjudged insufficient; but no such attachment shall be dissolved in such cause if the plaintiff file a good and sufficient affidavit to be approved by the court in such time and in such manner as the court shall direct; such affidavit may embrace the same ground of attachment as set forth in the previous affidavit, or any other grounds, or both at the option of the affiant." This statute is remedial, and

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should be liberally construed. *Tevis v. Hughes*, 10 Mo. 241.

En passant, it may be remarked, that the statutes authorizing garnishments apply to actions by attachments. *Middleton v. Frame*, 21 Mo. 412. Now, if there was appended to the plaintiff's petition, an affidavit for an attachment, though insufficient—lacking in two essential parts—could the court, in the face of the statutory interdict, refuse to permit "the plaintiff to file a good and sufficient affidavit?" *Musgrove v. Mott*, 90 Mo. 107.

In *Norton v. Flake, Adm'r*, 36 Mo. App. 698, it was said, "the defendant's contention is, that the first affidavit being insufficient to confer jurisdiction, that it could not be amended. It may be well questioned whether the first branch of this contention is true, and, if so, whether or not the broad and comprehensive provisions of the statute do not authorize in express terms the exercise of the power of amendment in such case. The statute has made no distinction as to the power of amendment of affidavits for attachment." "In *State ex rel. Crain v. Lyon*, 51 Mo. 114, it was held that a justice of the peace, who has under the statute precisely the same power with respect to amendments of affidavits for attachment as courts of record, may, after judgment in an attachment suit, allow an amendment of an affidavit to be made so as to authorize the seizure of property otherwise exempt." As was said in *Norton v. Flake, Adm'r, supra*, "the question of the sufficiency of affidavits to confer jurisdiction has generally arisen in proceedings collaterally attacking judgments rendered thereon, and in such cases the question is sometimes very close and of great nicety, but in cases like this, when the proceeding is an original one, no reason appears why it should be so narrowly scanned where it is simply sought to amend it. The object of the law, no doubt, is in cases where there is a defect of

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jurisdiction on account of some departure from the direction of the statute in the proceeding to allow an amendment and thus perfect the jurisdiction." The rule in this state now seems to be that the power of amendment cannot be invoked when there is absolutely nothing conferring jurisdiction, but only when it is defectively acquired. *Burnett v. McCluey*, 92 Mo. 230.

Again in respect to the affidavit it may be remarked that the statute nowhere requires it to be signed by the affiant, and in the absence of such requirement it would not be defective on account of not being signed. If the proper affidavit for attachment required by the statute is accompanied by the certificate of the officers before whom it is made, then it is complete. It need not be signed by the affiant. This is non-essential. *Smith v. Benton*, 15 Mo. 371; *Soswell v. The Church*, 46 Mo. 276; *Crum v. Elliston*, 33 Mo. App. 591.

In *Hargadine v. Vanhorn*, 72 Mo. 370 (see dissenting opinion of SHERWOOD and NORTON, JJ.) it is said: "Under the statute an affidavit performs the same office in an action by attachment, as it does in that of replevin." The analogy is indisputable, and in the latter action we have held that an unsigned affidavit may be amended and that no question of jurisdiction arises in permitting such omission to be supplied by the amendment. *Crum v. Elliston, supra.* So that an unsigned affidavit is not defective for that reason, or if it is, then it is amendable.

Now then the affidavit in question is *insufficient* in only one essential particular and that is as to the signature of the attesting officer, before whom it was made, as to his certificate. His certificate was complete in every respect. Now in *Bergesh v. Keivil*, 19 Mo. 127, which was an action of replevin where the affidavit required by the statute was signed by the plaintiff but was without the *jurat*—the certificate of the officer

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before whom made, it is said, that *under such circumstances the trial court might have permitted the petition to be verified nunc pro tunc.* I am, therefore, constrained to think that the want of a *jurat* to the affidavit was not such an insufficiency as prevented the court from acquiring jurisdiction of the *res.* At most the jurisdiction was only defective, and was perfected by the filing of the amended affidavit which was complete in all its parts.

Whatever there is in *Bray v. McCluey*, 55 Mo. 128, and *Burnett v. McCluey*, 78 Mo. 676, that may be thought to conflict with the views herein expressed is disapproved of by a unanimous court in *Burnett v. McCluey*, 92 Mo. 230. In *Owens v. Johns*, 59 Mo. 89, there was no written oath at all, no affidavit required by the statute. There was, however, the *jurat* of the clerk appended to the petition. It was held that there was nothing to amend; while this case decides nothing adversely to the views I have expressed, it may be well questioned whether the rulings there have not been touched upon by the provisions of the statute and some of the prior and subsequently decided cases of that court. It seems to me that if full force is given to the language employed in the opinion in that case, that it will be found to practically contravene the express provisions of the attachment statute, section 445, and the general statutory provisions of allowing amendments. In any view which I have been able to take of this case, I have been unable to discover that any error was committed by the circuit court in permitting an amended affidavit to be filed by the plaintiff.

II. But there is still another ground which may be urged in support of the action of the trial court, and which I think is impregnable. The sufficient affidavit filed by the plaintiff in the first instance stated a perfect statutory ground for an attachment. Now, if we ignore the existence of the second, or amended, affidavit,

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and treat the first as the only one before the court, what effect then should be given to it? The defendant filed his plea in abatement thereto and thus waived the exceptions to it. *Henderson v. Drace*, 30 Mo. 358. The affidavit stated the constitutive facts required by the statute, and the minor defects complained of, I think, were, upon the general principle governing pleadings under our statute, waived by the plea in abatement, which was filed thereto. *Hill v. Morris*, 19 Mo. App. 256; *Silver v. Railroad*, 21 Mo. App. 5; *Bradley v. Ins. Co.*, 28 Mo. App. 7; *Scovill v. Glasner*, 79 Mo. 452. There is no ground for disturbing the judgment of the circuit court, and the motion for a rehearing ought, in my opinion, for the reasons already stated, to be sustained.

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JONAS MEYBERG, Respondent, v. JACOB JACOBS, Defendant; M. GOLDMAN, Interpleader and Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Burden of Proof:** SALE ADMITTED: FRAUD PLEADED: HARMLESS ERROR. Where plaintiff's answer to an interplea in an attachment suit admits the sale and transfer of possession to the interpleader, but pleads fraud in avoidance thereof, the burden of proof is on the plaintiff to show the fraud, but a direction of the court to the parties before the testimony began, that the burden was on the interpleader to show *prima facie* the ownership of the goods attached, is, under the circumstances of this case, harmless error.

2. **Evidence:** FRAUDULENT CONVEYANCES: DECLARATIONS OF AGENT: INDEBTEDNESS OF GRANTOR: GOODS PURCHASED OF PLAINTIFF. On the trial of an interplea in an attachment suit in which the sale by defendant to the interpleader is attacked for fraud, it is proper to ask, on cross-examination, the husband and agent of the interpleader, what he had said about this not being the first sale he had

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had attacked as a "humbug sale;" and to admit judgments of other creditors against the defendant, and to show that a portion of the goods transferred to interpleader were sold defendant by the creditors in attachment suits.

3. **Pleading:** ANSWER TO INTERPLEA: INDEBTEDNESS. An answer to an interplea need not allege defendant's indebtedness to plaintiff, where the interplea itself admits it.

4. **Fraudulent Conveyances:** CREDITOR SECURING DEBT: MUST STOP AT THAT. If a *bona fide* creditor do more than obtain his debt, and thereby put it in the power of his debtor to hinder, delay or defraud other creditors, and does it for that purpose, the act in going beyond what he legitimately might do will taint and vitiate the whole transaction, as where he takes more goods than are necessary to pay his debt, and pays the difference in money to his debtor.

On rehearing.

5. ——: ——. An instruction to the effect that a creditor, in securing his own debt, cannot do so with a view of aiding the debtor to hinder, etc., his creditors approved.

Appeal from the Gasconade Circuit Court.—HON. RUDOLPH HIRZEL, Judge.

AFFIRMED.

Edwards & Davison, Pope & Kiskadden, for the appellant.

(1) The court erred in requiring the interpleader to assume the burden of proof. *Albert v. Besel*, 88 Mo. 150; *Sutter v. Gutzweiler*, 39 Mo. 91; *Knapp, Stout & Co. v. Joy*, 9 Mo. App. 47; *Hazell v. Bank*, 95 Mo. 60. (2) The giving of the judgments against Jacobs in evidence was wrong. The judgments were prematurely rendered. Interpleader was no party to those suits. *Ladd, Patrick & Co. v. Couzens*, 35 Mo. 513; *Norcross v. Hudson*, 32 Mo. 227; 1 Greenl. [14 Ed.] sec. 522. (3) The question asked defendant, and appearing on page 10 of statement, was entirely

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improper, and ought to have been overruled. 1 Greenleaf [14 Ed.] sec. 455. (4) The court erred in allowing evidence to go to the jury as to the goods in the stock attached, that was bought from the several parties attaching. This is no suit to enforce a vendor's lien. *State use of, etc.*, *v. Mason*, 96 Mo. 127; *Parker v. Rhodes*, 79 Mo. 91; *Hess v. Clark*, 11 Mo. App. 492. (5) A debtor has the right to prefer one creditor to another, and the creditor has the right to accept such preference, if he act honestly for the purpose of securing his own debt, though it was the intention of the debtor, in making the preference, to hinder or delay other creditors, and the preferred creditor knew it. And instruction number 4 on the part of the plaintiff should not have been given. *Shelley v. Boothe*, 73 Mo. 74; *Holmes v. Braidwood*, 82 Mo. 610; *Kuykendall v. Middleton, Perry & Co.*, 15 Mo. 416–420; *Potter v. McDowell*, 31 Mo. 62–74; *Sexton v. Anderson*, 95 Mo. 373; *Albert v. Besel*, 88 Mo. 150–152. (6) The answer of the plaintiff to the interplea does not aver that plaintiff was a creditor of Jacobs, and hence showed no standing of plaintiff in this suit, or right to litigate the title to the goods with interpleader.

Sale & Sale and *Robert Walker*, for the respondent.

(1) The court committed no error in requiring the interpleader to show a *prima facie* title. This is the extent of the court's ruling. At no stage of the proceedings was the court called upon to rule on the question of burden of proof. The court required interpleader to show a *prima facie* title, by producing a bill of sale, or showing a transfer and delivery of possession. This was proper and legal. *Albert v. Besel*, 88 Mo. 150. (2) The plaintiff was entitled to a personal judgment against his debtor, regardless of a thousand interpleas. No act on the part of Mr. Goldman could

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deprive appellant of his right to a personal judgment against his debtor, when the law expressly entitles him to such a judgment. Waples on Attachment, p. 481–2. (3) The fraudulent intent of Jacobs was an issue in the case. Without proof of that fraudulent intent, plaintiff could not succeed as against interpleader. The question asked witness, on page 19 of appellant's brief, elicited, and was plainly intended to elicit, the fact that Jacobs had bought goods from the plaintiff in this case, and from others who were the plaintiffs in other cases against Jacobs, shortly before his sale to Goldman; had bought goods so recently before the purchase by his sister-in-law that a great part of the goods sold to Goldman were the very goods for the purchase price of which we were suing. This surely shows preparation on the part of Jacobs to carry out the fraud that we charge, and was, therefore, admissible and relevant. This point has been decided by our courts on many occasions. *Desberger v. Harrington*, 28 Mo. App. 632; *Holmes v. Braidwood*, 82 Mo. 610; *Singer v. Goldenberg*, 17 Mo. App. 549; Bump on Fraud. Con. [3 Ed.] p. 582. The admission of evidence which is competent for any purpose is not error; and where one claims that the evidence was competent only for a special purpose, he should ask an instruction to that effect. *Schlicker v. Gordon*, 19 Mo. App. 483–484; *Barbour v. McKee*, 7 Mo. App. 587; *Babb v. Ellis*, 76 Mo. 459. (4) This court will not consider the question raised relating to the instructions, for the reason that no proper exception was taken to any instructions given. A general exception to a mass of instructions must be overruled, if any one of the instructions be correct. *Harrison v. Bartlett*, 51 Mo. 170; *Robinson v. Suter*, 15 Mo. 599; *Care v. Fogg*, 46 Mo. 44; *Jones v. Osgood*, 2 Selden, 233; *Smedis v. B. Co.*, 88 N. Y. 14; *Adams v. State*, 25 Ohio St. 587; *Haggart v. Morgan*, 55 Am. Dec. 350, and cases cited; *Barton v. Ferry Co.*,

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114 U. S. 474; *Ins. Co. v. Invest. Co.*, 112 U. S. 250; Thompson's "Charging the Jury," sec. 116; *Rubelman case*, 13 Mo. App. 522; *Covanhovan v. Hart*, 21 Pa. St. 500; *Frederick v. Allgaier*, 88 Mo. 598; *McVeigh v. Baxter*, 82 Mo. 518; *Levy v. Williams*, 79 Ala. 171; *Owens v. Hobbie*, 82 Ala. 466; *Leinkauff v. Frankle*, 80 Ala. 136; *Oppenheimer v. Halff*, 68 Tex. 409. (5) The personal judgments against Jacobs were admissible to establish, *first*, plaintiff's position as a creditor; *second*, to show the amount of Jacobs' indebtedness. A judgment rendered after the transfer is sufficient evidence of the debt. *Church v. Chapin*, 35 Vt. 231; *Young v. Pate*, 4 Yerg. 164; *Vogt v. Ticknor*, 48 N. H. 242. As against strangers, a judgment is admissible to prove its existence and legal effect. Wharton, Law of Evidence [3 Ed.] sec. 823.

W. S. Pope and *Edwards & Davison*, for the appellant on rehearing.

The eighth instruction, given on behalf of plaintiff, was clearly wrong. It told the jury that, in order to determine whether the sale by Jacobs to Goldman was fraudulent in the meaning of the instructions, they might take into consideration the acts, conduct and statements of Jacob Goldman and Jacob Jacobs, as sworn in the evidence. This was entirely too broad. There should have been some limit as to the statements. Certainly what was said after sale could not prejudice interpleader or hurt her, and what was said not in presence of Goldman could not bind interpleader. *Holmes v. Braidwood*, 82 Mo. 614, 615.

Sale & Sale and *Robert Walker*, for the respondent on rehearing.

(1) We now come to the only point made by the appellant that has not heretofore been considered and disposed of by this court, to-wit: The instruction,

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number 8. The jury are instructed that, in order to determine whether the sale by Jacobs to Goldman was fraudulent, within the meaning of the instructions given, they may take into consideration the acts and conduct and statements of Jacob Goldman and Jacob Jacobs, as shown by the evidence, as well as all the facts and circumstances surrounding the whole transaction." *Holmes v. Braidwood*, 82 Mo. 610; *Clark v. Hammerle*, 27 Mo. 70; Thompson on Trials, sec. 2341. The fourth instruction is complained of. We venture the assertion in the presence of this learned court, that this instruction contains a statement of the most elementary proposition in the law of "fraudulent conveyances." The third instruction is sustained by the following cases: *Rupe v. Alkire*, 77 Mo. 641; *Sellers v. Bailey*, 29 Mo. App. 174; *Erhardt v. Estel*, 6 Mo. App. 6; *Covanhovan v. Hart*, 21 Pa. St. 500; *Frederick v. Allgaier*, 88 Mo. 598; *McNichols v. Richter*, 13 Mo. App. 515; *McVeigh v. Baxter*, 82 Mo. 518; *Coffin Co. v. Rubelmann*, 15 Mo. App. 280; *Levy v. Williams*, 79 Ala. 171; *Owens v. Hobbie* 82 Ala. 486; *Leinkauff v. Frankle*, 80 Ala. 136; *Oppenheimer v. Halff*, 68 Tex. 409.

Ellison, J.—A trial in the circuit court resulted against the interpleader and she brings the case here for review.

Jacobs was engaged in the mercantile business and had become insolvent. He owed a number of wholesale merchants for goods purchased of them. He also owed Mrs. Goldman, the interpleader, a sum amounting to $1,429.61. In order to collect her debt she purchased of Jacobs his entire stock, inventoried at $2,319.25, cost price, for $1,723.48, turning in, in payment, her debt of $1,429.61 and paying him in cash $293.87. The plaintiff Meyberg brought suit by attachment against Jacobs and attached the goods which had

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been transferred to interpleader. She filed her interplea, claiming the goods as her property. Plaintiff's answer to the interplea admitted the sale and transfer, but charged that it was in fraud of creditors.

I. At the opening of the trial, before the testimony began, "the court, upon inquiry of parties, ruled that the burden of proof, under the pleadings, was upon interpleader to show, *prima facie*, the ownership of the goods attached." As the sale and transfer of the possession of the goods to the interpleader was admitted by plaintiff's answer to the interplea, thus admitting interpleader to have been in possession claiming ownership, it may be conceded that the court's ruling was erroneous, as under such state of the case interpleader was *prima facie* the owner, and her title could only be overthrown by proof of fraud; such proof to be made by the party making the charge. But, notwithstanding this, did the ruling stated work any harm to interpleader. The cause was tried with the aid of a jury and no instruction was given them asserting the proposition stated in the ruling. The evidence was submitted to them without guide as to the burden of proof, and they passed upon it without prejudice in that regard. Interpleader might, if she had so desired, or thought the jury needed instruction on that point, have asked a suitable instruction. This was not done, and we are not able to discover what harm could result from a mere direction given to the attorneys at the beginning of the trial. No evidence offered by interpleader was excluded; it does not appear which party opened and closed the case to the jury, and the action of the court was practically only directing the order of testimony, a matter largely in its discretion.

II. The question put to interpleader's husband, a witness in the cause, and who transacted all the business, as to what he told Mr. Walker about this not

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being the first sale he had had attacked as a "humbug sale," was eminently proper, especially on cross-examination.

Exception was taken to the action of the court in admitting a number of judgments of other creditors of Jacobs. The evidence was properly admitted, as it was an aid to plaintiff's case to show there were creditors; and the judgments, while not binding upon those who are strangers to them, yet are proper evidence to establish the existence of debts owing by the parties against whom they are rendered. The point made that these judgments in favor of third parties should not have been entered until after the interplea in this cause was tried is not tenable. If the point was good under any circumstances (which we do not concede) it would not have availed interpleader in this cause, the object of the testimony being to show the indebtedness of Jacobs.

We think it was competent to show, under the circumstances surrounding this case, as it has been developed by the testimony, that a portion of the goods transferred to interpleader by Jacobs were the goods sold to him by the creditors in the attachment suits. It was a circumstance properly admissible as tending to show fraud on the part of Jacobs. And notwithstanding that fraud alone, on the part of Jacobs, would not defeat interpleader's title; yet such fraud on his part is a part of the case to establish, and, if shown to have been participated in by the interpleader, completes the case. The evidence was admissible, therefore, as tending to show the design of Jacobs, even though, standing alone, it did not connect interpleader. *Desberger v. Harrington*, 28 Mo. App. 632; *Singer v. Goldenberg*, 17 Mo. App. 549; *Holmes v. Braidwood*, 82 Mo. 610.

It is next objected that the plaintiff's answer to the interplea fails to allege any indebtedness to plaintiff. This was rendered unnecessary by the allegations of the interplea admitting plaintiff was a creditor.

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III. The matter, then, resolves itself to this, which in reality is the principal question: Does the case connect interpleader with the fraud? Without going into other circumstances shown in the cause, it is enough to justify the verdict against interpleader, to consider one phase of the case. The goods purchased by interpleader amounted, after the discount allowed, to $293.87 more than her debt, and this sum she paid in cash, knowing, as testified by her husband and agent, that her vendor "was going down hill," and that he was indebted to others and was unable to pay. We deem this evidence alone sufficient to uphold the verdict of the jury. The rights and privileges of a creditor of an insolvent debtor are pointedly stated in the following extract from an opinion of Judge BLACK in *Covanhovan v. Hart*, 21 Pa. St. 495:

"One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for everyone to be the foremost. He who has the advantage, whether he gets it by the preference of the debtor or by his own superior vigilance, or by both causes combined, is entitled to what he wins, provided he takes no more than his honest due. To pay a creditor his just debt in law, at a fair valuation, is no more a fraud upon other creditors than to pay him in bank notes or silver dollars. Neither is it any worse or more fraudulent for a creditor to secure himself by taking a conveyance, than it would be to enter up judgment. He gets no greater advantage by the former means than by the latter. The notion of the defendants in error seems to be that the creditor of an insolvent man cannot avoid the imputation of fraud in any way except by cheating himself."

While a creditor may thus lawfully seek and obtain a preference from his insolvent debtor over his fellow

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creditors, he must quit at that. Notwithstanding his debt may be *bona fide*, yet if he do more than obtain his debt and thereby put it in the power of his debtor to hinder, delay or defraud the other creditors and does it for such purpose, the act in going beyond what he legitimately might do will taint and vitiate the whole transaction. *Oppenheimer v. Halff & Bro.*, 68 Tex. 409; *Levy v. Williams*, 79 Ala. 171; *Leinkauff v. Frankle*, 80 Ala. 136; *Owens v. Hobbie*, 82 Ala. 466; *McVeigh v. Baxter*, 82 Mo. 518.

We think the judgment should be affirmed, and it is so ordered.

ON REHEARING.

Ellison, J.—On the original consideration of this cause we did not pass upon interpleader's objections to instructions given for plaintiff, for the reason that we did not consider that exceptions had been saved by the action of the trial court. We are now satisfied that the bill of exceptions, as set forth in appellant's printed abstract, sufficiently stated an exception to the action of the trial court. *Elsner v. Supreme Lodge*, 98 Mo. 640. It shows the objections to the instructions were made *after* they had been passed upon, and was not a mere objection, in the first instance, to them being given.

The complaint as to the instructions is confined in appellant's brief on rehearing to numbers 4 and 8. Number 4 is as follows: "4. The court declares the law to be that every transfer or sale of goods or property, made with the intent or purpose to hinder or delay or defraud creditors or any creditor of a just debt, is utterly void as to creditors. If, therefore, the jury believe from the evidence that J. Jacobs, in selling his stock of goods to Goldman, intended to defraud or to hinder or to delay any of his creditors, and that Goldman knowing, or having reasonable grounds to believe, that such was the intent or purpose of said

Jacobs, accepted the sale of such goods with a view of aiding or assisting Jacobs in carrying out such intent, your verdict must be for the plaintiff and against Goldman, although you may believe that Jacobs was justly indebted to Goldman in the sum claimed by Goldman." This states unquestionable law. For notwithstanding one purchases goods and pays value for them (or, which is the same thing, takes them in payment of a debt), yet, if he does this with the intent and design to aid and assist his vendor in cheating and defrauding creditors, the sale is void as to creditors.

Instruction number 8 is the one usually given in a case where a question of fraud is to be determined; and taken in connection with the other instructions, to which it refers, is not subject to the criticism made upon it by counsel.

On account of the evident earnestness and sincerity of counsel we have again considered the cause as originally presented, but after such consideration feel constrained to adhere to what was said in the original opinion. The judgment is affirmed. All concur.

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CHARLES COOPER *et al.*, Appellants, v. JOSIAH STANDLEY, Respondent.

Kansas City Court of Appeals, March 31, 1890.

1. **Attachment:** VOLUNTARY CONVEYANCE: INTENT. A voluntary conveyance of the husband to the wife made at a time when he was indebted beyond his ability to pay, the effect of which conveyance is to hinder and delay the creditors of the husband, is fraudulent and void as to such creditors and furnishes ground for attachment, and the motives of husband in making such conveyance are wholly immaterial.

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2. ———: HUSBAND AND WIFE: LAND BOUGHT WITH WIFE'S MONEY. If the husband purchases land with money belonging to his wife, and holds the same for and in her behalf, then he might lawfully convey said land to her, and such transaction would not furnish grounds for attachment.

3. **Husband and Wife**: WIFE'S SEPARATE ESTATE: CONSIDERATION. Where a wife in Illinois received money from her father's estate, which her husband then spent in improving his own real estate, and, upon his selling the same, the wife refused to join in the deed except upon receiving her money back which was accordingly paid her, and which she took and claimed as her separate means; and, upon removing to Missouri, the husband used the same in purchasing real estate and took the title thereto in himself, *held*, these facts constituted the money the separate property of the wife and furnished a good consideration for a conveyance from the husband to the wife.

4. ———: CHATTELS OF WIFE AT COMMON LAW: STATUTORY SEPARATE PROPERTY. In the absence of proof the Missouri courts will presume the common law in force in Illinois. While at common law the chattels of the wife vested in the husband by virtue of the marriage yet he could waive his rights thereto and permit her to retain them released from the husband's marital rights. And where, as in this case, the wife's money was set aside to her in Illinois, it became her separate means, and as such she brought it to this state where it was impressed with the provisions of our laws and was her statutory separate property, of which her husband could not deprive her, without her assent in writing.

Appeal from the De Kalb Circuit Court.—HON. OLIVER M. SPENCER, Judge.

AFFIRMED.

S. G. Loring, for the appellants.

(1) Courts do not take judicial knowledge of the statutes of Illinois—that has to be proven the same as any fact. *Flato v. Mulhall*, 72 Mo. 525; *Myer v. McCabe*, 73 Mo. 236; *White v. Chaney*, 20 Mo. App. 396. (2) In the absence of evidence this court will presume that the common law was in force in Illinois at the time Mrs. Standley sold her interest in her father's

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estate to her brothers, and by that law the title to the money arising from the sale of her said interest vested in her husband, Josiah Standley. *Woodford v. Stephens*, 51 Mo. 445; *Myer v. McCabe*, 73 Mo. 241; *White v. Chaney*, 20 Mo. App. 395; *Flato v. Mulhall*, 72 Mo. 525; *Clark v. Clark*, 86 Mo. 122. (3) The possession of Mrs. Standley of the proceeds of said sale of the Illinois farm, while in Illinois, was the possession of her husband, and, although he pretended to have given to her there twenty-three hundred dollars, that did not change the title to the property. It was his. *Sloan v. Terry*, 78 Mo. 627; Bump. on Fraud. Conv. [3 Ed.] 311 and 313; *Woodson v. Pool*, 19 Mo. 344. (4) This money, being under the laws of Illinois the absolute property of the husband, the bringing of the money to Missouri by Mrs. Standley did not have the effect to divest the title from the husband and vest it in her. *Myer v. McCabe*, 73 Mo. 241; *White v. Chaney*, *supra*. (5) Even if he had given the money to her in Illinois, the evidence shows that when defendant Standley came to Missouri he took the twenty-three hundred dollars, bought the land attached, took the land in his own name, gave a mortgage, with his wife, to secure the balance of the purchase price. There is no evidence that after Standley came to Missouri he agreed to take the money—not by virtue of his marital rights, but as trustee for his wife. If there had been such a contract it will be upheld only when the proof is sufficiently clear and convincing as to show beyond question that such was the distinct understanding and agreement of the husband and wife in respect thereto. *White v. Chaney*, *supra*; *Hammons v. Renfrow*, 84 Mo. 342; Bump on Fraud. Conv. [3 Ed.] 307-311; *Kidwell v. Kirkpatrick*, 70 Mo. 216; *Clark v. Clark*, 86 Mo. 123; *Jordan v. Buschmeyer*, 97 Mo. 97. (6) The court erred in refusing the third instruction prayed for by the plaintiffs. The evidence upon their part

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tended to show that Standley made the deed to Smart for the sole purpose of placing the title in his wife, and that neither Smart nor Mrs. Standley paid any consideration for the deed—that the conveyance was a voluntary one. The court should have submitted that question to the jury. This instruction was proper under the evidence. *Potter v. McDowell*, 31 Mo. 67; *Patten v. Casey*, 37 Mo. 118; *Hurley v. Taylor*, 78 Mo. 238. (7) The money was his under the laws of that state, and when he came to Missouri he takes the money without any agreement with her, purchases the the land, takes the title in his own name, retains it until the plaintiffs are pressing him for their money, and then, without any solicitation upon her part, it suddenly occurs to him that he ought to pay her the money he had received from her father; he conveys to her through Smart every dollar of his property he has that was not exempt from execution. The fourth instruction upon the part of the plaintiffs should have been given and the third upon the part of the defendant should have been refused. *Clark v. Clark, supra; White v. Chaney, supra.* (8) The court erred in giving the second instruction for the defendant. In it the court told the jury in effect that, although they believed that the deeds through which Standley conveyed the title to the lands attached to his wife were voluntary, yet they must further find that at the time he executed the deed to Smart he did it with the intent of hindering or delaying his creditors, or they must find for the defendants. *Potter v. McDowell*, 31 Mo. 69.

R. B. Randolph, Casteel & Haynes, for the respondent.

(1) This court will not presume that the common law was in force in Illinois. In the absence of testimony the law of the forum will govern. *Flato v. Mulhall*, 72

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Mo. 525; *Sloan v. Terry*, 78 Mo. 623. (2) The evidence is explicit in regard to the money with which this land was purchased being the proceeds of her separate estate. She brought it here with her; the land was purchased with it, and without any fault of hers the deed was made to her husband. In order to rectify the mistake he caused it to be reconveyed to her. The conveyance was in no sense a voluntary conveyance. (3) The defendant Standley would have been compelled by a court of equity to have conveyed the land to his wife. Bump on Fraud. Con. [3 Ed.] p. 310. (4) The conveyance of the land to the wife is not fraudulent. *Burns v. Bangert*, 92 Mo. 177; *Davis v. Land*, 88 Mo. 436; *Hartzler v. Tootle*, 85 Mo. 23. (5) Prior to act of 1875 the husband could waive his marital rights to the wife's property. *Botts v. Gooch*, 97 Mo. 91; *McCoy v. Hyatt*, 80 Mo. 130; *Clark v. Clark*, 86 Mo. 116. His delivery to her of the money derived from her father's estate in Illinois was a recognition of her ownership, was perfectly lawful, and was done long before the notes in evidence were executed. (6) A conveyance which will authorize an attachment, on the ground that it is in fraud of creditors, must be absolutely void as to creditors, so as to create a resulting trust in their favor and constitute the grantee a trustee for their benefit. *Forster v. Mullanphy*, 16 Mo. App. 150, affirmed, 92 Mo. 79. (7) The verdict is for the right party. The instructions fairly presented the issues to the jury, and under them they have found the issues for defendant, which finding is supported by a great preponderance of the testimony, and should not be disturbed.

GILL, J.—In October, 1885, plaintiffs, Cooper & Co., sued defendant Standley on four promissory notes, amounting in the aggregate to thirteen hundred dollars, excluding interest, which were executed February, 1882, and the last thereof maturing in February, 1884. While

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this action was pending, and in aid thereof, plaintiffs in June, 1887, sued out an attachment, and levied upon certain lands in De Kalb county as the property of defendant Standley. The ground of attachment set out in the affidavit, and relied upon at the trial, was that defendant had fraudulently conveyed his property so as to hinder or delay his creditors. Issue was joined by defendant's plea in abatement, and the same was tried in the circuit court, where the jury rendered a verdict for the defendant; and, on judgment being entered thereon dissolving the attachment, plaintiffs have appealed to this court.

I. To sustain the allegation of fraudulent conveyance, contained in the attachment affidavit, the plaintiffs rely upon the showing made, to-wit, that on June 7, 1884, the defendant, owing at the time notes in suit and otherwise insolvent, deeded to his wife the De Kalb county land. The evidence showed indisputably that the wife *at the time* paid nothing therefor, and it is claimed, therefore, by plaintiffs that such conveyance of Standley to his wife was voluntary, without any consideration, and, therefore, fraudulent and void as to then existing creditors. Standley at the trial, however, testified that the land was purchased with his wife's separate means, and that he simply "gave this land over to her as her just dues."

Before detailing other facts necessary to be considered in this case, we will, with the view of narrowing the field of controversy, settle some of the legal questions contained in counsel's briefs.

If the conveyance of Standley to his wife, made in June, 1884, was merely voluntary—a gift—without consideration of any kind known as valuable, and made at a time when he was indebted beyond his ability to pay, and the effect of such conveyance was to hinder and delay these plaintiffs or other existing creditors in making their claims against said grantor, then it was

fraudulent and void as to such creditors and furnished ground for this attachment. The *motives* of the grantor in deeding the land to his wife under such circumstances are wholly immaterial. The law pronounces the transaction a fraudulent one as against the then existing creditors. Standley would not be permitted to give away his property to the prejudice of his creditors. "*Just before generous*," is the maxim. *Potter v. McDowell*, 31 Mo. 62; *Douglas v. Cissna*, 17 Mo. App. 44; *Patten v. Casey*, 57 Mo. 118; *Lionberger v. Baker*, 88 Mo. 447.

The correlative of the foregoing proposition, however, is that, if defendant Standley purchased the land with money belonging to his wife and held the same for and in her behalf, then he might lawfully convey said land to her, and such transaction would not furnish grounds for attachment. The question arises then, was the De Kalb county land bought with the separate means of Mrs. Standley?

In this connection the undisputed evidence shows the following facts, substantially: Prior to the fall of 1881, Standley and his wife resided in the state of Illinois, from which state they removed to De Kalb county, Missouri, and purchased the land, attached, in October, 1881. While the Standleys resided in Illinois, and during the years 1873 and 1875, Mrs. Standley came into the possession of an inheritance from her father's estate, amounting in the aggregate to nearly two thousand dollars. It seems that her husband used this money in improving some land he owned there. Preparatory to coming to Missouri in 1881, Mr. Standley sold this real estate in Illinois, but the wife refused to join in the deed except upon condition that out of the proceeds she be paid back the money formerly inherited from her father. Standley consented and gave over to his wife the sum of twenty-three hundred dollars which she took and claimed as her own separate means.

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Mrs. Standley brought this sum to Missouri, and her husband used it in purchasing the land in De Kalb county. The deed thereto was, without question, taken in the name of the husband. After this, in June, 1884, defendant Standley (as he claims for the purpose of returning to his wife that which belonged to her) made the conveyance to Mrs. Standley, which is now attached by this attachment proceeding. We hold that these facts clearly establish Mrs. Standley's title to the money thus invested in the De Kalb county land. And, unless by reason of the subsequent conduct of husband and wife the wife parted with the means thus held by her, it continued her property and furnished good consideration for the conveyance in June, 1884.

II. Plaintiff's counsel is correct in the assertion that in the absence of proof as to the laws of Illinois the courts of Missouri will presume the common law in force there. *Bain v. Arnold*, 33 Mo. App. 631, and cases cited. And by force of the common law the money inherited by Mrs. Standley in Illinois in 1875 became the property of her husband. Yet, as repeatedly announced in this state, "while at common law the chattels of the wife vested in the husband by virtue of the marriage, yet he could waive his rights thereto and permit her to retain them, released from the husband's marital rights." *Clark v. Clark*, 86 Mo. 114; *Bethel v. Bailey*, 35 Mo. App. 463, and cases cited on p. 469. Hence the twenty-three hundred dollars, set aside to Mrs. Standley on the sale of the farm in Illinois in the fall of 1881, became her own separate means, and as such she brought it into the state of Missouri. Here it was impressed with the provisions of our laws, and was her statutory separate property, of which her husband could not deprive her, except in the manner provided by our statutes, section 3296, Revised Statutes, 1879.

The mere *use* of such means by Standley did not destroy Mrs Standley's title, since she never consented

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thereto in writing. *Broughton v. Brand*, 94 Mo. 169; *Gilliland v. Gilliland*, 96 Mo. 522; *Bangert v. Bangert*, 13 Mo. App., 144.

It follows, therefore, that the transfer of the land by Standley to his wife in 1884, in the absence of actual fraud, did not constitute a voluntary conveyance in fraud of creditors and supplied no ground for an attachment. The jury found, under the instructions given by the court, that the conveyance was in good faith, and since the undisputed facts do not establish a constructive fraud, the judgment was for the right party, and is affirmed. All concur.

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WILLIAM GIBBONS, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Damages:** CONDEMNATION PROCEEDINGS: ABANDONMENT AND RE-INSTITUTION OF. When proceedings for condemnation are dismissed, notwithstanding they may have been re-instituted, the party instituting them will be liable in an action for damages occasioned by the first, unless such damage was adjudicated in the second; and whether they were so adjudicated is a question which may be tried as was done in this case by submitting it to the jury on evidence.

2. ——: ——: ATTORNEY'S FEE: EVIDENCE: EXPERT TESTIMONY. An attorney's fee in a first condemnation proceeding is a proper element of damage, provided it is a reasonable one, and the court incline to the opinion in the absence of evidence to the contrary of that offered by the plaintiff, that the fee in question was reasonable, though no lawyers were called to show it reasonable, as jury are not confined to the testimony of experts in fixing the value of professional services.

Appeal from the Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

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Statement of the case by the court.

The evidence in this case shows that on the twenty-seventh day of May, 1887, the plaintiff was the owner of a sawmill situated on a lot of ground in the city of Boonville, Missouri, on which he had a lease which had about four years to run; that on the date aforesaid the defendant commenced proceedings in the circuit court of Cooper county, Missouri, to condemn, for railroad purposes, plaintiff's property; that under the proceedings commissioners were appointed, who assessed the damages occasioned the property by its appropriation at the sum of three thousand dollars; that defendant filed exceptions to said report, and that upon exceptions the proceedings were continued from term to term until the twenty-fifth day of February, 1888, when it was voluntarily dismissed by defendant's attorneys and all proceedings thereunder discontinued. The evidence further shows that, prior to the commencement of said condemnation proceedings, the plaintiff was operating his sawmill and using the leased premises in connection therewith, and was engaged in sawing, shipping and selling lumber, and was receiving therefrom an income; that at the time of the commencement of said proceedings and at various times thereafter the plaintiff was informed by defendant's agents and attorneys that his said property would be taken for railroad purposes, and, in consequence thereof, plaintiff was afraid to take orders for lumber and to contract for logs, and his business was for several months virtually stopped. The evidence further shows that on the twenty-ninth day of October, 1888, the defendant commenced a second proceeding against plaintiff and his said property for its condemnation for the same purpose as the first, which said proceeding was prosecuted to final judgment, and, under which, said property was actually taken and appropriated.

This suit was commenced by plaintiff to recover for the losses sustained by him by reason of his having been

deprived of the use of his property during the pendency of the first proceeding and for the costs and expenses incurred by him in defending said proceeding. And, upon the trial in the circuit court, plaintiff obtained judgment for five hundred dollars, from which the defendant has appealed.

Wm. S. Shirk, for the appellant.

(1) It was error for the court to admit any evidence of any of the damages alleged in the petition under the pleadings. The plaintiff's petition and reply, read together, aver and admit a state of facts, under which plaintiff was not entitled to recover, viz.: *First.* That the purpose and intention of defendant to condemn the right of way across the lot of plaintiff was never abandoned. *Second.* That before the first proceedings were dismissed, a second suit to secure such right of way had been brought, which was prosecuted to a final judgment of condemnation of such right of way. There was, therefore, no such abandonment of the proceedings, as in law, entitled the plaintiff to recover. *Liesse v. Railroad*, 2 Mo. App. 105; s. c., 72 Mo. 561; Lewis on Em. Dom., sec. 568, on page 858. The second proceeding was prosecuted to a final judgment of condemnation on the one hand, and assessment of damages on the other. It is a conclusive presumption of law, that this last assessment of damages included all damages, and all elements of damage to the plaintiff's property, which had accrued to him, from whatever source, up to the time the jury assessed them. Lewis on Em. Dom., sec. 565, and cases cited. (2) Plaintiff's first instruction, being in direct conflict with the principles of law stated in point, *supra*, is erroneous. (3) Plaintiff's second instruction is erroneous and misleading. As to part of it, it does not correctly state the measure or rule of damages, and a part of it is not supported by any evidence whatever. *First.* It instructs the jury to

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assess the plaintiff's damages "at whatever amount you may believe, from the evidence, the rental value of the plaintiff's property of which he was deprived by defendant's said proceedings was worth." There is no evidence that the possession of the premises was taken from plaintiff, by the first proceedings, for a single moment—only that the use thereof was so interfered with as to diminish the rental value. The instruction should have fixed the measure of damages at the difference between its rental value, before the proceedings were begun and afterwards. *Second.* It tells the jury to include in the assessment "reasonable attorney's fees paid or agreed to be paid." There is not a particle of evidence proving, or tending to prove, that the two hundred and fifty dollars, agreed to be paid by plaintiff to his attorneys, was a reasonable fee. Defendant can only be held liable for a reasonable attorney's fee—not any fee which he may have paid, or agreed to pay, and it devolved upon him to show, by proper evidence, that the fee paid or agreed to be paid was a reasonable and proper one. There was no such evidence. Citation of authorities on such a proposition is unnecessary. But see Weeks on Attorneys, secs. 338, 340; Abbott's Trial Ev., p. 377-8; *Pearson v. Darrington*, 32 Ala. 227, 262; *Webb v. Browning*, 14 Mo. 354; 1 Am. & Eng. Cy. Law, p. 966.

Cosgrove & Johnston, for the respondent.

(1) The completest refutation of the first point in the brief of appellant's counsel that can be given will be found in the case cited by him in support thereof, viz.: *Leisse v. Railroad*, 2 Mo. App. 105, and 72 Mo. 561. (2) In the second assessment of damages on plaintiff's property under which it was finally taken, the costs, expenses and losses occasioned by the first proceeding were not considered, and could not have

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been. The commissioners or jury in the second proceeding could only estimate the damages resulting from that proceeding, they could not estimate prior injuries to the property or losses to the owner, occasioned by prior acts of the railroad. They only had to consider of the present and the future, not of the past. Lewis on Em. Domain, sec. 565; *Dearborn v. Railroad*, 24 N. H. 179. (3) Plaintiff's first instruction, which is complained of by appellant, submitted to the jury the question as to whether the damages claimed in this suit were considered by the jury in the assessment of damages in the second proceeding for the condemnation of said property. Evidence was offered by plaintiff, without objections, on that point, and the instruction was proper. (4) Appellant claims that the trial court erred in telling the jury to include in the assessment of damages "reasonable attorney's fees paid or agreed to be paid," because there was no evidence proving, or tending to prove, that the two hundred and fifty dollars, agreed to be paid by plaintiff to his attorneys, was a reasonable fee. The evidence of plaintiff tends to prove that the sum of two hundred and fifty dollars was a reasonable fee. *Hale v. Meegan*, 39 Mo. 272; *Hammerslough v. Ass'n*, 79 Mo. 80. The jury was authorized to determine the reasonableness of the attorney's fees from its "own knowledge and ideas" on the subject. *Head v. Hargrave*, 105 U. S. 45. (5) Respondent's contention is, that having contracted with his attorneys to pay them two hundred and fifty dollars for their services to be rendered in said proceeding, and having proved this fact, the burden was then thrown upon the defendant to prove that said contract price was unreasonable.

Ellison, J.—The principle which should govern this case will be found in the opinion delivered in *Leisse v. Railroad*, 2 Mo. App. 105; s. c., 72 Mo. 561.

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But it is contended here as a distinction between this and the case cited that here the proceedings were not abandoned. That they were re-instituted and prosecuted to a final condemnation of the property. In this respect this case does differ from the one cited, but the court instructed the jury that, if they believed from the evidence that the damages sustained by plaintiff in the first proceedings were not included in the damages assessed in the second, the second proceeding was neither a bar nor defense to this action. This instruction was properly given, as the plaintiff had the unquestioned right to show by oral testimony that the present claim was not adjudicated in the second proceedings.

This, however, as I understand it, does not include the full scope of defendant's contention. It is further urged, since there was a second proceeding, begun even before the first was dismissed, that there was no abandonment, and that unless there is a final abandonment of the proceedings no damages as claimed here can follow. We do not think this position sound. Defendant was liable for damages arising by reason of the first proceedings and the prosecution of the second will not absolve it. Though ordinarily it would be presumed that such damage was included in the assessment under the second, yet this presumption is not conclusive as claimed by defendant. Whether such was the fact in this case was submitted to the jury who have found for the plaintiff.

We, therefore, hold that where proceedings for condemnation are dismissed, notwithstanding they may have been re-instituted, the party instituting them will be liable in an action for damages occasioned by the first unless such damage was adjudicated in the second; and that whether they were so adjudicated is a question which may be tried as was done in this case by submitting it to the jury on the evidence adduced. *Brown*

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v. Weldon, 34 Mo. App. 378; *Snodgrass v. Moore*, 30 Mo. App. 232; *State v. Orahood*, 27 Mo. App. 496; *Lightfoot v. Wilmot*, 23 Mo. App. 5.

II. Plaintiff's attorney's fee in the first proceeding was a proper element of damage, provided it was a reasonable one, and we are inclined to the opinion, in the absence of evidence to the contrary of that offered by plaintiff, that the jury were authorized to find the fee in question was reasonable. No testimony of lawyers was introduced to show the fee was reasonable, nor do we think it absolutely necessary that it should have been done. The plaintiff testified that the attorneys charged him three hundred dollars, to which amount he objected as being unreasonable, but that he finally agreed on two hundred and fifty dollars. Considering that juries are not confined to the testimony of experts in fixing the value of professional services we think the evidence adduced was sufficient to go to the jury. *Head v. Hargrave*, 105 N. S. 45; *City of Kansas v. Street*, 36 Mo. App. 666.

The instructions for defendant were more than, in our opinion, it was entitled to, but of this it cannot complain. The judgment is affirmed. All concur.

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JAMES E. POTTER, Respondent, v. CHARLES A. EVERETT, Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Contract: GROWING TIMBER: LICENSE.** An unsealed and unacknowledged written contract, whereby, for a valuable consideration to be thereafter paid, growing timber on a certain piece of land is sold, is a mere executory contract and conferred but a license to remove the trees.

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2. **Growing Trees:** REALTY: LICENSE TO ENTER AND REMOVE. Whatever may be the law elsewhere, growing trees, standing on land, are, in this state, a part of the realty and must so remain until severed therefrom, and the title to them while so standing can be passed and acquired only by a statutory deed; and an intention on the part of the licenser and the licensee, evinced by contract, that the latter shall within a reasonable time enter, sever and remove such growing trees, does not have the effect to convert the same into personal property, until the license is exercised and this, though the license within certain limits be irrevocable.

3. **Execution:** PROPERTY SEIZED UNDER: CLAIMED BY ANOTHER. When the rights of a licensee to enter, sever and cut growing trees are interfered with by means of an execution, his remedy for such wrong cannot be pursued under the provision of sections 2366, *et seq.*, Revised Statutes, 1879.

4. ———: LICENSE: PERSONAL TRUST NOT VENDIBLE. A license to enter upon another's land and sever and remove standing trees therefrom is in its nature a personal trust, and not the subject of a levy and sale under execution.

Appeal from the Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

Walker & Johnston, for the appellant.

(1) The court erred in refusing each of the instructions asked by the execution plaintiff, Charles A. Everett. Growing timber is an interest in lands, and any conveyance thereof, to be effectual, must be by deed under seal. R. S. 1879, sec. 674; *McIlvaine v. Harris*, 20 Mo. 457; *Deland v. Vanstone*, 26 Mo. App. 297; *Andrews v. Costican*, 30 Mo. App. 29; *Green v. Armstrong*, 1 Denio, 550; *McGregor v. Brown*, 10 N. Y. 114; *Slocum v. Seymour*, 36 N. J. 138; 1 Benjamin on Sales [4 Am. Ed.] sec. 120; 1 Washburn on Real Property [6 Ed.] 14. (2) The attempted sale of the growing timber by White, the owner of the land, to Steinbrink, it not being by deed under seal, created

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a mere license in Steinbrink to enter on the land, and cut and remove the timber. *Andrews v. Costican*, 30 Mo. App. 29; *Fuhr v. Dean*, 26 Mo. 116. (3) Steinbrink's interest, being a mere license, could not be sold by him to Potter. A license to be exercised upon the land of another is a personal trust and confidence, and is not assignable; although it may be binding as between the parties, it will not pass to a purchaser. *Fuhr v. Dean*, 26 Mo. 116; *Howe v. Batchelder*, 49 N. H. 204; *Carleton v. Redington*, 21 N. H. 291; *Cowles v. Kidder*, 24 N. H. 364; *Emmerson v. Fisk*, 6 Greenl. (Maine) 200; *Mendenhall v. Klinck*, 51 N. Y. 246, 258; *Daniels v. Bailey*, 43 Wis. 566; *Morrill v. Mackman*, 24 Mich. 279; *Kamphouse v. Gaffner*, 73 Ill. 453; *Manning v. Frazier*, 96 Ill. 279; Browne St. Frauds [4 Ed.] sec. 22; 1 Washburn Real Prop. 623, 399. (4) If the attempted sale by White to Steinbrink had been by deed under seal, and acknowledged, this would have operated as a severance in law of the growing timber, converting it into personalty; and Steinbrink by oral contract could then have sold to Potter; otherwise not. *Kingsley v. Holbrook*, 45 N. H. 313. (5) The attempted sale by White to Steinbrink, not being by deed under seal, did not operate as a severance of the growing timber, and there could therefore be no possession of the growing timber separate from the possession of the land. White being the owner, and in possession of the land, was also in possession of the timber growing on it. *Renshaw v. Lloyd*, 50 Mo. 368; *Railroad v. Freeman*, 61 Mo. 80; *Bell v. Clark*, 30 Mo. App. 224; *Owens v. Lewis*, 15 Am. Rep. 295, *loc. cit.* 321; *Schulenberg v. Harriman*, 21 Wall. 44. (6) Even if the attempted sale by White to Steinbrink was sufficient (which we deny), yet the attempted sale by Steinbrink to Potter was not sufficient under the statute of frauds. The price exceeded thirty dollars, and there was no part payment. The agreement to discharge

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or cancel a debt is not a part payment, under this statute. *Combs v. Bateman*, 10 Barb. 573; *Fox v. Hall*, 74 Mo. 315; Benjamin on Sales [4 Am. Ed.] sec. 192. (7) The proceeding under section 2366, Revised Statutes, 1879, is cumulative as a remedy. It does not deprive the claimant of his remedy by replevin, trover or trespass, or his action against the sheriff on his bond. As in the other cases, this proceeding is "a formal trial in court of the rights of property." *Houx v. Shaw*, 18 Mo. App. 45; *Stephen v. Springer*, 23 Mo. App. 375; *State ex rel. Mastin v. McBride*, 81 Mo. 349; *Gartside v. Nixon*, 43 Mo. 138; *Fleming v. Clark*, 22 Mo. App. 218; *Schulenberg v. Harriman*, 21 Wall. 44; *Bosse v. Thomas*, 3 Mo. App. 472; *Stern Auc. & Com. Co. v. Mason*, 16 Mo. App. 473; *Young v. Glasscock*, 79 Mo. 574.

T. M. Rice, Cosgrove & Johnston, for the respondent.

(1) At the time of the levy of the execution the claimant Potter had such an interest in the timber in controversy as he could protect under section 2366, of the Revised Statutes, 1879. He had purchased it of Steinbrink with the consent and approval of the owner of the land; he had, by authority of the owner of the land, entered upon the land and was engaged in cutting and removing said timber, and the same had been fully paid for. *McIlvaine v. Harris*, 20 Mo. 457. (2) We admit that Steinbrink only obtained from the owner of the soil a license to enter on the land and cut and remove the timber, and we admit that such license could not be sold by Steinbrink, except with the consent and approval of the owner of the soil. But the assent of White, the owner of the land, to the sale of Steinbrink to Potter, his authority to Potter to enter upon the land thereunder and cut and remove the timber therefrom, and his acceptance from him of

the balance of the purchase money, were in effect a revocation of the license to Steinbrink, and the granting a new license by the owner of the land to Potter, under which Potter held possession at the time of the levy. (3) Claimant's contention is that his interest in the timber, as shown by the foregoing facts, coupled with the actual possessions of the land and timber, authorized him to maintain a proceeding under section 2366. *Fuhr v. Dean*, 26 Mo. 116, and *Andrews v. Costican*, 30 Mo. App. 29, are the principal cases relied upon by appellant's counsel, and are lacking in every essential element of actual possession either of the land or timber; and are therefore not "on all fours" with the case at bar.

SMITH, P. J.—In October, 1886, John W. White, who was the owner, in fee, of eighty acres of land in Cooper county, entered into an unsealed and unacknowledged written agreement with Fred. Steinbrink, whereby the former, for the consideration of one hundred and fifty-one dollars, to be thereafter paid to him, in certain installments, sold to the latter the growing timber on said land. When the first installment became due, Steinbrink was unable to meet it. The written contract was then by parol agreement modified, Steinbrink securing all of the contract price of the timber, except about ten dollars, and White giving him until October, 1887, to remove the timber. Steinbrink, under this contract, caused part of the timber to be cut down, and sawed into lumber. In September, 1887, he wrote the respondent a letter, proposing to him to take the "timber he bought from White, for one hundred and fifty dollars, to get his money out of it." He was indebted to respondent, who was a merchant, for goods amounting to eighty-seven dollars. In November following, he notified White, that "I have sold all the timber on your land to Jim Potter, the same as I bought

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it from you." White testified that he made no objection to respondent taking possession of the land, under the Steinbrink contract, but on the contrary he told him to go ahead and cut the timber whenever he wanted to, and that, thereupon, respondent caused some of it to be cut, and sawed. It further appears that respondent paid to White the small balance due, by Steinbrink, on the contract. In November, 1887, the appellant recovered judgment in the Cooper county circuit court against Steinbrink, and that afterwards on January 24, 1888, an execution was issued thereon, which was on the same day levied by the sheriff on the said growing timber, situate on said land, and thereupon the respondent made claim thereto as provided in sections 2366, 2367, Revised Statutes. The controversy, thus arising, proceeded, under the said statutory provisions, to judgment which was for Potter, the respondent.

I. Section 2366, *supra*, provides, that when *any personal property* * * *, or other effects, shall be seized by virtue of any execution, and any person other than the debtor, in the execution, shall in writing, verified by himself, or some credible person, claim such property or any part thereof, and shall in such claim set forth the right, title or interest of such claimant in and to said property, etc.; and the succeeding section provides that the pleadings and practice, in such case, shall be governed, as far as practicable, by the law relating to the same in civil actions.

The proceeding thus provided is quite analogous to that of the statutory action for claim and delivery of personal property, and, like that action, can be resorted to for the purpose of determining controverted claims to personal property only. It can no more be converted into an action of ejectment, than can that action.

The underlying question here is, whether the growing trees levied upon, and which are made the

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subject of respondent's claim, should be treated as personal property. If the former, the respondent's claim may be sustained, but, if the latter, it must fail. Considering, as we must, that the respondent succeeded to all the rights which were acquired by Steinbrink, under his contract with White, in respect to the trees standing and growing on the land, mentioned, still, under its provisions, can we treat such standing and growing trees as goods, wares and merchandise? This contract in our opinion must be regarded as if the respondent was an original party thereto. He, by consent of both Steinbrink and White, was substituted therein in the place of Steinbrink. The rights of respondent are not different than if he had been an original party to the contract. As to the nature of the contract it is sufficient to say, that it was nothing more than a bill of sale. It was not sealed or acknowledged, and it was therefore, as a conveyance under our statute, ineffectual to convey any interest in the land. R. S., sec. 670; *Andrews v. Costican*, 30 Mo. App. 29; *Deland v. Vanstone et al*, 26 Mo. App. 297; *Fuhr v. Dean*, 26 Mo. 116.

It was a mere executory contract as to the trees still unsevered from the soil, and conferred upon the respondent *but a license* to remove the same. The respondent under the contract was authorized to cut down and remove the timber, when he wanted to, which, of course, meant within a reasonable time, otherwise his license would amount to an interest in the land. Though the respondent, under the contract, had only a license to cut down and remove the timber, yet, as he had paid the contract price therefor, and had entered upon the land and removed a part of it, the contract was so far executed, that the license it conferred was for that reason not the subject of revocation within the limitations already indicated. *Fuhr v. Dean, supra.* But while the respondent was authorized, under his

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license, to enter and sever the timber from the soil, can it be said that the existence of such unexercised license rendered such unsevered timber personal property? Can a part of the realty be in that way converted into chattels personal? Notwithstanding the existence of the license, do not such growing trees remain part of the realty until there is a severance? It has been asserted by some eminent jurists and law writers, that the land on which growing trees are standing, and which are subject to be cut down and removed under a license for that purpose, is a warehouse in which the trees, considered as goods, are stored; while others have said, that such growing trees though primarily part of the realty, they may become goods, wares, and merchandise when they are sold, and are subject to severance and removal, in a short or reasonable time after the sale, —such sale is not a part of the realty.

As to what is the correct doctrine in respect to this question, neither the elementary writers, nor the adjudged cases, will be found in entire accord. In 2 Washburn on Real Property, 598, it is said a man may grant trees growing on his land, without deed. The law regards these things as so much of the character of chattels, as not to require the formality of a deed, to pass the property in them. Sheppard's Touchstone, 231, is to the same effect.

In 1 Greenleaf's Cruise, 55, section 45, it is stated that "the principle now most generally recognized seems to be this: That in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have the right to the soil for a time for the purpose of further growth and profit of that which is the subject of the sale, it is an interest in the land within the meaning of the fourth section of the statute of frauds, and must be proved by writing; *but when the thing is in prospect of separation from the soil, immediately or within a reasonable and convenient time, without a*

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stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within the statute; although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land."

The *italicized* portion of the preceding paragraph was quoted approvingly by Judge SCOTT, in *McIlvaine v. Harris*, 20 Mo. 458, which was a case where a deed was executed for land with a growing crop of wheat upon it, and it was held that parol evidence was inadmissible to show that the wheat was reserved by the grantor. This evidence shows that an interest in the land did not pass, which the law said did pass. In *Marshall v. Green*, 1 Common Pleas Division (Eng. Law Rept.) 35, Lord COLERIDGE, C. J., in an able and exhaustive opinion, discusses the proposition, whether, when the thing sold—growing trees—is to be taken away as soon as possible, the contract is not for an interest in land, and remarks, amongst other things, that "apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees, to be taken away immediately, was not a sale in land but merely of so much timber." In Browne on the Statute of Frauds, section 254, it is said that the doctrine of *Marshall v. Green*, *supra*, had been previously declared and followed in the courts of last resort, in the states of Maine, Kentucky, Maryland, Connecticut and Pennsylvania.

Sterling v. Baldwin, 42 Vt. 306, was a suit for trespass for breaking and entering the plaintiff's close, and cutting and taking away a quantity of hemlock timber. Plea, the general issue. The defendants gave in evidence this writing:

"August 24, 1864, sold to William Quimby all the hemlock timbers standing and down, east of Heselton's potato field, on the minister's lot, so called. Quimby is to have one year from next June to get the timbers

off the land. Received one hundred dollars in full of the timber. ADAMS HESELTON."

It was held that the sale of the trees, evidenced by the writing, vested in Quimby the property with the right to take the trees away within the time specified. Between the parties to the contract, the trees were mere chattels. Contracts for *fructus industriales* are at common law considered emblements, and go to the executor, while contracts for *prima vestura* go to the heir as if the realty. Browne on Stat. Frauds, sec. 250. In *Whitman v. Walker*, 1 Met. 313, it was declared that a license for one to enter and remove trees would pass no interest in the land and would be valid and enforceable without writing. These authorities are quite convincing that the growing trees in land may be bargained for and sold as goods and chattels. To borrow the language of COLERIDGE, C. J., in *Marshall v. Green, supra*, "Common sense tells us that this may be done."

But, whatever may be the law elsewhere, it seems to be held in this state that growing trees, standing on land, are a part of the realty, and that title to them, while so standing, can be passed and acquired only by a statutory deed. *Deland v. Vanstone*, 26 Mo. App. 297; *Andrews v. Costican*, 30 Mo. App. 297; *Railroad v. Truman*, 61 Mo. 80.

According to our understanding of the law as it has been declared in the cases just cited, the growing trees here in dispute are a part of the realty and must so remain until severed therefrom; and that an intention on the part of the licenser and licensee, evinced by the contract, that the latter shall within a reasonable time enter, sever and remove such growing trees, does not have the effect to convert the same into personal property, until the license is exercised, and this, though the license within certain limits, be irrevocable. The right to enter, sever and remove the trees is all that respondent can claim, and if this right be interfered with before

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exercised by the appellant or any one else, the remedy cannot be pursued under the provisions of the statute here sought to be made available.

It follows, from these consideration, that in so far as the instructions given by the circuit court declared the said standing and growing trees to be personal property, and not part of the realty, the same were erroneous. We are not understood as holding that the contract already alluded to, and which conferred upon the respondent a license to enter upon said land and cut down and remove the growing trees therefrom, was invalid and inoperative, in any respect, or that a sale of said growing trees by the sheriff, under his said levy and execution, would pass any title thereto.

It may not be out of place to here remark, that the license of Steinbrink under said contract, to enter upon White's land and sever and remove the standing trees therefrom, was in its nature a personal trust, and not the subject of a levy and sale under execution. It could not even be assigned by Steinbrink without the consent of the licenser.

The judgment of the circuit court, for these reasons, will be reversed. All concur.

GEORGE PORTH, Appellant, v. CHRIST LUX, Respondent.

Kansas City Court of Appeals, March 31, 1890.

Stolen Goods: OBJECT OF PURCHASER OF, NO DEFENSE: INSTRUCTION. The fact that the purchaser of a stolen machine, who was an agent for the sale of the machine in a given territory, made the purchase with the view of convincing his principal that his territory was being invaded, constitutes no defense to an action against the vendor for the return of the purchase price, and an instruction to that effect is erroneous.

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Appeal from the Miller Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED AND REMANDED.

T. B. Robinson and *Moore & Williams*, for the appellant.

(1) The appellant had a perfect right to dispute the title of the respondent to the machine he got of him, and to take upon himself the *onus* of showing that the latter had no title to the property. He ascertained this fact by taking the machine to St. Louis for the purpose of clearing up the mystery connected with the machine and the sale thereof by some unauthorized party. He found it was stolen property, as he believed. It was claimed and taken by the true owner, as he believed (A. W. Wood & Co.), who took it from him under claim of title. It was not necessary to wait till a suit was brought by the true owner before giving peaceable possession. *Matheny v. Mason*, 73 Mo. 682, and citations; *Burt v. Dewey*, 40 N. Y. 286; *Sweetman v. Prince*, 26 N. Y. 286. (2) It follows, therefore, that the only question to be submitted to the jury was that of the ownership of the machine: Was it stolen or was it the property of A. W. Wood & Co., as claimed by the plaintiff, or did defendant have title to it as claimed by respondent. The instructions on both sides are based on this theory, except number 3, given for defendant. This instruction was erroneous and misleading. What does it matter as to plaintiff's motive when he bought or traded for the machine from defendant and in his possession, if it afterwards turned out to be stolen property, or that the defendant had no title to it. On this instruction alone the case should be reversed.

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W. S. Pope, for the respondent.

Cited: 65 Mo. 325; 82 Mo. 215; 72 Mo. 414; 71 Mo. 574; *Crawford v. Thoroughman*, 13 Mo. App. 579.

GILL, J.—This is an action for the amount alleged to have been paid defendant by the plaintiff for a Domestic sewing machine. The case originated, and was tried, before a justice of the peace in Miller county, was appealed to the circuit court, where, on trial before court and jury, a verdict and judgment was had for the defendant and plaintiff has appealed.

Porth is a merchant at Jefferson City, and had the exclusive agency for the sale of the Domestic sewing machine in Miller county, and by agreement the price of the machine to be sold by plaintiff was fixed at forty dollars. In the conduct of the business plaintiff came to the knowledge of the fact that defendant Lux, residing in Miller county, had purchased from some one a "Domestic" machine, and at the price of thirty-five dollars. Plaintiff thereupon complained to the company, his principal; and upon the denial that any such sale had been made by the company, plaintiff negotiated with defendant for the purchase of said machine, resulting in plaintiff acquiring the same in consideration of another machine and ten dollars paid defendant. After thus securing the Lux machine it was found to have been stolen from Wood & Co., dealers in St. Louis, and to the rightful owners plaintiff surrendered the said machine. Defendant refused to return to plaintiff the purchase price thereof, whereupon this action was brought.

At the trial in the circuit court, various instructions were given, and which in the main fairly declared the law governing the case. Instruction number 3, however, given at the instance of the defendant, was entirely outside the substantial issues of the case, and

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ought not to have been given. Said instruction reads as follows: "3. If from all the facts and circumstances in the case as developed by the evidence the jury believe that the plaintiff made the trade with defendant for the purpose and with the design to either prove his truthfulness to the company he was agent for, or for the purpose of entrapping and detecting his principal in selling inside of territory allotted to him to sell in, then they will find the issues for the defendant." What had the matter of this instruction to do with the defense of this suit? Take it as true that plaintiff bought the machine with the view of convincing his company that his territory was being invaded, did such a purchase deprive him of the rights of an ordinary purchaser for value? The vicious nature of this instruction is too plain for extended comment, and doubtless furnishes a solution for this extraordinary verdict, which, on the face of this record, appears very clearly for the wrong party. Judgment reversed and cause remanded for a new trial. All concur.

CLEMENCE ELLS *et al.*, Respondents, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, March 31, 1890.

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1. **Deed:** RULE AS TO DELIVERY OF. The delivery of a deed is complete, when the grantor or obligor has parted with his dominion over it, with the intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent.

2. ——: CONSTRUCTION: SPECIAL WORDS V. GENERAL WORDS: RULE. When a deed first speaks in general words, and afterwards in special words, and the latter accord with the former, this deed shall operate according to the special words, whether they enlarge or restrain the general words that precede; and where, as in this

case, a deed for a right of way described the grant as a hundred feet in width through, etc., a certain tract, including a dwelling house, and subsequent special words described it as fifty feet on the north, and fifty feet on the south, side of the center of the track of the railroad of the grantee, as the same may be finally located and constructed over said tract, etc., the special words authorize the appropriation of any other strip of the grantor's land upon which the grantee might finally change the location of its line.

Appeal from the Moniteau Circuit Court.—Hon. E. L. Edwards, Judge.

Affirmed.

Wm. S. Shirk, for the appellants.

(1) The evidence wholly fails to show an acceptance of the deed by any one authorized to accept the same for the defendant. On the contrary, at the trial the plaintiffs were in possession of the same, produced the same, and offered it in evidence, but did not tender it to defendant. (2) At the trial plaintiffs claimed that the deed offered in evidence conveyed a right of way one hundred feet in width across any part of plaintiffs' lot; yet the deed conveys only a specific one hundred feet, upon which a dwelling house stands, and plaintiffs notified defendant that just whatever land that deed takes it could have, and no other. The plaintiffs' first instruction should not have been given. *First.* It was misleading, and against the evidence. It assumed as a fact that defendant had taken possession of the strip described in the deed and had held possession of the same up to the trial. Such was not the fact. See second subdivision of point 1. *Second.* It told the jury that they should find for the plaintiffs if the evidence showed merely that a verbal contract was made, and that in pursuance thereof the plaintiffs executed for the strip to the defendant, and that defendant took possession. It did not require the jury to find that the

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deed was ever accepted by defendant, or any one else authorized so to do. Without showing an acceptance of the deed, plaintiff could not recover. See first subdivision of point 1. (3) The second instruction given for the plaintiff was grossly erroneous. It tells the jury that the deed read in evidence conveyed to the defendant a right of way over any part of the plaintiff's land, where defendant might choose to locate it. The latter clause did not operate to permit the defendant to entirely relocate its right of way across the lot at a different place, but only to make such slight changes as might become necessary in actually constructing the track. To give any other effect to this clause would be to permit the defendant to stake out a right of way across plaintiff's lot, down on the river bank, remote from the dwelling house, and procure from plaintiff a deed for the same, and afterwards relocate its right of way, so as to include the dwelling house on an entirely different strip. The specific description must prevail over the general.

Cosgrove & Johnston, for the respondent.

(1) It appears from the deed in evidence, executed and delivered by plaintiffs to the defendant that plaintiffs conveyed to the defendant a strip of ground one hundred feet in width across his land, "as the same may be finally located and constructed over said tract aforesaid and as it may pass through the lands and premises of the grantors herein." This deed was written by defendant's attorney, and the purpose of the foregoing clause was to give to the defendant the right to locate the line of its road anywhere it saw proper across said land, and the evidence shows this to have been the understanding of the plaintiff and defendant's attorney. (2) The evidence shows that the deed was delivered to defendant's agent, which certainly implies its acceptance. (3) "Where it appears that a party is general agent for another in all matters pertaining to a

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particular business, special limitation upon his authority, which is unknown to a party dealing with him in such business, cannot be shown in evidence so as to affect the right of such party." *Bates v. Holiday*, 31 Mo. App. 162; *Summerville v. Railroad*, 62 Mo. 391; 100 Am. Dec. 78; 70 Am. Dec. 226; 72 Am. Dec. 757; 10 Am. State Reports, 585. The deed "provides for" the conveyance of a strip of ground one hundred feet in width "as the same may be finally located and constructed over said tract aforesaid and as may pass through the land and premises of the grantors herein." (4) When plaintiffs executed and delivered the deed to Stephens, it was done with the intent on their part that it should take effect as their deed in favor of the defendant. It was so held by said Stephens and after its delivery to him was beyond the control and right of the dominion of the plaintiffs. (5) Plaintiffs' second instruction was not erroneous. It interpreted the deed properly and in accordance with the language used by the draughtsman, who was the attorney and agent of the defendant. It is plain that it was the intention of Col. Crews, who wrote the deed, and the plaintiffs who signed it, that the railroad could take one hundred feet over any part of the plaintiffs' land where defendant might choose to locate it. At the time of executing this deed the railroad had not determined what part of the land it would take, but its attorney was shrewd enough to reserve the right to take one hundred feet wherever the defendant might finally locate and construct its track, and plaintiffs in said deed conveyed to the defendant one hundred feet of their ground with this understanding and intention.

SMITH, P. J.—Plaintiffs are husband and wife, living in the city of Boonville, Missouri, and, in the year 1886, the wife was the owner of a lot of ground, described in the petition. In or about the month of November, 1886, the defendant was contemplating the

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construction of a railroad through Cooper county and over plaintiff's said land, and was represented by Col. T. W. B. Crews, its attorney and agent, who was, about the date aforesaid, engaged in securing, by gift, purchase or condemnation, rights of way for said contemplated railroad through Cooper county, including the city of Boonville. Col. Crews, as the authorized agent of defendant in procuring rights of way for said railroad, through said county, called upon plaintiffs in the month of November, 1886, and attempted to negotiate with them for the purchase of a right of way over said land. Not being able to agree as to the price, Col. Crews and Mr. Ells agreed to leave the matter to three men, who viewed the premises and fixed the price, but this having been done without any notice to plaintiffs, they objected, and then Col. Crews and plaintiffs agreed that each one should again choose one man and these two a third, who should fix a price for said right of way, by which plaintiffs and defendant should be bound. Three arbitrators were accordingly selected, who viewed the premises, and agreed upon the amount which defendant should pay plaintiffs therefor, which was five hundred dollars.

On the same day said arbitrators notified Col. Crews and the plaintiffs of their action. Col. Crews immediately prepared a deed to be executed by plaintiffs, and insisted upon its being signed, acknowledged and delivered at once, and, as he was about to leave town, he directed that it should be delivered to Speed Stephens, cashier of Central National Bank, and he (Crews) would attend to getting the money for plaintiffs. In accordance with this request, the plaintiffs executed the deed and deposited it with said Stephens. The deed describes the land conveyed as "strip of land, one hundred feet in width through, over and across a certain lot of ground, including a dwelling house thereon, situate in a certain township, section and range." There is a clause in the concluding part of the

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deed which provides, that "the strip of land, hereby conveyed, having an area of about three-fourths of an acre, being one hundred feet in width, or fifty feet on the north side, and fifty feet on the south side, of the center of the track of the railroad of the party of the second part, as the same *may be finally located and constructed over* said tract aforesaid, and as it may pass through the land and premises of the grantors herein."

About three months after the execution and delivery of the deed, and after plaintiffs had called at the bank, of which Stephens was cashier, for their money, and it had not been paid, Col. Crews sent one Joe Green to plaintiffs to inform them that he did not want the right of way described in the deed, and that they could go to Stephens and get the deed. In the meantime, the railroad company had made a new survey over the said lot of ground and taken possession thereof, and constructed its railroad thereon, and, after doing so, had commenced proceedings to condemn said land which proceedings are still pending in the circuit court of Cooper county. Plaintiffs, therefore, commenced this suit to recover the sum of money for which they had sold their property and executed a deed, and, in the court below, obtained judgment for the sum sued for, from which the defendant has appealed.

I. The first question which the record presents, for our decision, is, whether there was a delivery of the deed, from the plaintiffs to the defendant. It is laid down in 2 Greenleaf's Evidence, section 297, that "the delivery of a deed is complete, when the grantor or obligor has parted with his dominion over it, with the intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent." In 3 Washburn on Real Property, 297, it is said that "if a deed is delivered to one, who is authorized by another to receive it for him, or to one without such previous authority, but authorized by the grantee

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to retain it for him, it is held to constitute a delivery." In *Cook v. Brown*, 34 N. H. 460, it is said, "there must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of the depository, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none.

In *Henry v. Henry*, 65 Mo. 689, it was said that the infallible test of a delivery is the fact, that the grantor has divested himself of all dominion and control over the conveyance. In *Hammerslough v. Cheatham*, 84 Mo. 13, it was said that, "to constitute a delivery of a deed, by placing it in the hands of a third party, it must be done with the intent, on the part of the grantor, that it should take effect, as his deed, in favor of the grantee. It must be so held, by the third party, as to be beyond the control and right of dominion of the grantor." There was nothing, in the circumstances of the delivery of the deed to Stephens, negativing the intention that it as the present deed of the plaintiffs, or as beginning to take effect presently, or in other words there was nothing to show that the putting the deed in Stephens' hands was an *escrow*.

A careful examination of the evidence has convinced us that the deed was unconditionally delivered to Stephens by the plaintiffs, at the instance and request of defendant's agent and attorney; that the plaintiffs parted with their dominion over the deed, and that, by the delivery, it took effect and became operative as a conveyance of the land it described. It seems to us, that the depositing of the deed with Stephens, by the plaintiffs at the request of defendant, constituted a delivery to, and an acceptance of it. And this view finds support in other facts, that we shall presently advert to.

II. Even if the deed, in question, was delivered and accepted, the ultimate rights of the parties to this

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suit, it is suggested, are largely dependent upon what the words therein employed shall be interpreted to mean.

This instrument granted to the defendant a right of way, or easement, over the land of the grantor. The grant was for "a strip of land one hundred feet in width, through, over and across the lot including a dwelling house." The dwelling house was within the one hundred feet strip, upon which the defendant's roadway had been located. But in case there should be a change of location of the line of defendant's road, on the plaintiff's said tract of land, the granting part of said deed was broadened by the special clause following it, which we have already transcribed into the statement of the case, so as to authorize the appropriation, by defendant, of any other strip of the plaintiff's land, upon which it might finally change the location of its line. The rule is, that "when a deed first speaks in general words, and afterwards in special words, and the latter accord with the former, this deed shall operate according to the special words, whether they enlarge or restrain the general words that precede." 3 Wash. Real Prop. 437.

It seems that the very terms of this special clause imply that the plaintiff had granted to the defendant a strip of land of certain width and area, the location of which was to be determined by the final location and construction of defendant's railway through plaintiff's land. The grant in the deed, then, authorized the final location and construction of the defendant's road, within the restrictions mentioned, anywhere on the tract of land therein described. The appropriation of the plaintiff's land, over which the defendant's road was finally located, was authorized by the grant, in the deed contained. The proceedings to condemn the right of way, which the defendant had previously acquired by the terms of said deed, was entirely superfluous. By this proceeding, it could acquire no greater or other

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right than that which had been already conferred by the deed. It is contended, that any right of way through said lands of plaintiff other than that on which the house was situate would be outside of the grant. This, we think, is a misconception of the scope and meaning of the grant, as enlarged by the special clause in the deed. This clause, if we give it effect, which we must, unless repugnant to the grant which precedes it, conferred upon the defendant the right to appropriate the land conferred by the original location of its line, or any other strip thereof, upon which it might choose to finally locate and construct its roadway. Under the deed, the defendant had the right to shift the right of way, from its first location, in which the house was situate, to the present one. The instructions given by the court are in harmony with the views we have expressed, and, as no substantial ground of error is perceived in the record, the judgment of the circuit court, with the concurrence of the other judges, will be affirmed.

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WILLIAM J. BABB, Respondent, v. THE CURATORS OF THE UNIVERSITY OF THE STATE OF MISSOURI, Appellants.

Kansas City Court of Appeals, March 31, 1890.

1. **Appellate Practice:** OBJECTIONS TO EVIDENCE WHEN CONSIDERED. The grounds of objection to the admission of evidence must be pointed out at the trial—must be distinctly specified—or they will not be noticed by the appellate court.

2. **Nuisance:** DAMAGES TO THE INHERITANCE: LOSS OF RENTS. In an action to recover damages for the creation of a nuisance where the evidence tended to show that the injury to plaintiff's premises were such that they did not stop with the existence of a nuisance, but effected a permanent injury to the value thereof, it is not error to instruct the jury, in estimating plaintiff's damage, any permanent depreciation in the value of his real estate occasioned by the nuisance might be considered.

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Appeal from the Boone Circuit Court.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

C. B. Sebastian, for the appellants.

(1) The issue joined in the cause by the pleadings was whether or not defendants were liable for the damage alleged to have been done plaintiff by the use of a sewer put in on the University grounds from the privies in the west end of the University building to a branch or ravine near Sixth street, and the evidence should have been confined to that issue. *Kuhn v. Weil*, 73 Mo. 213; *State to use v. Roberts*, 62 Mo. 388; *Belch v. Railroad*, 18 Mo. App. 80–85; *Kennedy v. Holladay*, 25 Mo. App. 514; *Williams v. Iron Co.*, 30 Mo. App. 662; *Pinney v. Berry*, 61 Mo. 359; *Van Hoosier v. Railroad*, 70 Mo. 145; *Dickson v. Railroad*, 71 Mo. 575. (2) The court further erred in giving and reading to the jury instructions numbers 1, 2 and 3, at the instance of plaintiff which are as follows: The principal objection to number 1 is to the words in italics, "or permanently depreciated in value." *Williams v. Iron Co.*, 30 Mo. App. 662; *Pinney v. Berry*, 61 Mo. 359; *Givens v. Van Studdiford*, 86 Mo. 149.

Turner & H. B. Babb, for the respondent.

(1) The court did not err in permitting the witnesses Babb, Lonsdale, Edwards, Lowry and Douglass to testify that the discharge from the sewer was washed, with the surface drainage, from the end of the sewer through several culverts, upon the respondent's premises. Such evidence was confined to the issues. R. S. 1879, sec. 3565; *Olmstead v. Smith*, 87 Mo. 602; *Bank v. Wills*, 75 Mo. 275; *Shelton v. Durham*, 76 Mo.

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434; *Meyer v. Chambers*, 68 Mo. 626; *Fischer v. Max*, 49 Mo. 404. (2) There was no objection whatever made by appellant, at the trial, to the evidence complained of, and no exception saved. The objection is, therefore, too late in the appellate court. *Wayne Co. v. Railroad*, 66 Mo. 77; *Naughton v. Stagg*, 4 Mo. App. 271. (3) Although the use of the sewer was discontinued in May, 1888, it was necessary for the jury to know the condition of the sewer, and the rental value of the property thereafter, to enable the jury to find the amount of damage which would be a compensation to plaintiff commensurate with his losses or injury. Sutherland on Damages [1 Ed.] p. 17; *Railroad v. Grahill*, 50 Illinois, 241; *Givens v. Van Studdiford*, 4 Mo. App. 498. (4) Because, at the trial, no specific objection thereto was made or specific exception saved by the appellant. *Lohart v. Buchanan*, 50 Mo. 201; *Bauer v. Franklin County*, 51 Mo. 205; *Rhorer v. Brockhage*, 15 Mo. App. 17; *Davis v. Hilton*, 17 Mo. App. 319; *Allen v. Mansfield*, 82 Mo. 688; Sutherland on Damages [1 Ed.] p. 17. (5) The case was tried on the proper theory, and the court did not err in giving instructions. The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury. 3 Sutherland on Damages [1 Ed.] p. 415–416. The plaintiff had a right to all the damages flowing directly from the tort of defendant. *Seeby v. Alden*, 61 Pa. St. 302; *Givens v Van Studdiford*, 4 Mo. App. 498 and 72 Mo. 129. (6) Having tried the case throughout on one theory the appellant cannot ask that it be reviewed in the appellate court on a different theory. *Nance v. Metcalf*, 19 Mo. App. 183; *Whetstone v. Shaw*, 70 Mo. 575; *Walker v. Owen*, 79 Mo. 568; *Corn v. City of Cameron*, 19 Mo. App. 573; *Bank v. Armstrong*, 62 Mo. 59; *Fell v. Mining Co.* 23 Mo. App. 216. If there was any error in the instructions given for the respondent, by the trial

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court, such error was waived by the appellant. *McGonigle v. Dougherty*, 71 Mo. 259; *Holmes v. Braidwood*, 82 Mo. 610; *Thorpe v. Railroad*, 89 Mo. 650.

Gill, J.—Plaintiff, the owner of a building and grounds adjoining the University site at Columbia, prosecutes this action against the college corporation to recover damages for the creation of a nuisance on his premises. On a trial in the circuit court plaintiff had a verdict and judgment for nine hundred and fifty-eight dollars and defendant has appealed.

The evidence adduced tends to establish the substance of the petition, the material portions of which read as follows: For his cause of action against the defendant, the plaintiff states that he is now, and since and prior to the year 1886, has been, the owner of a dwelling house and real estate adjacent to defendant's campus or college grounds, situated in the town of Columbia, in said county of Boone, and state of Missouri. That upon defendant's said campus are located its buildings for educational purposes, which said buildings are during the school session of each year occupied by more than five hundred persons. Plaintiff further states that, in the year 1886 the defendant constructed to be used, and thenceforth they were used, in connection with said building and by persons so occupying the same as aforesaid, certain privies and a sewer leading therefrom; that, through said sewer, the filthy contents of the vaults of said privies, and other garbage and offensive matter from defendant's said premises, have ever since been discharged near plaintiff's said premises into a small hollow or ravine, and thence have been washed or carried with the surface drainage, from defendant's said premises, through and across and upon the premises of the plaintiff. Plaintiff further states that by reason of the discharge of the filthy contents of the vaults of said privies and other garbage and offensive matter from defendant's said premises, near and upon the premises

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of the plaintiff, as aforesaid, filthy percolations therefrom have entered plaintiff's well; and divers noxious and offensive smells and gases, and infectious germs likely to produce human disease, arising therefrom, have infected the air upon plaintiff's said premises, and have entered into said dwelling house making the occupation of the same uncomfortable, and making the tenants thereof fatally or seriously sick; by reason whereof, and by reason of constant apprehension of sickness produced by the causes aforesaid the plaintiff's said premises and dwelling house were rendered untenantable, and have been unoccupied for a long space of time, and the value of plaintiff's property has been greatly depreciated, wherefore plaintiff says that, by reason of the premises, he has been damaged in the sum of two thousand dollars, for which he asks judgment.

I. A large portion of defendant's brief and printed argument is devoted to alleged errors of the trial court in admitting certain evidence offered by the plaintiff. From the examination of the record we find that the defendant is not entitled to be heard on these various questions of evidence. In most cases the record shows no exceptions saved, and in others it is only stated that "to this evidence defendant objected, objection overruled and defendant excepted." No grounds of objection are named in any instance? It is well understood that such general objections will not avail the appellant. The grounds of objection must be pointed out at the trial—must be distinctly specified—or they will not be noticed by this court. *Davis v. Hilton*, 17 Mo. App. 319; *Allen v. Mansfield*, 82 Mo. 688.

II. The only remaining errors complained of, which deserve to be noticed, relate to the court's instructions to the jury. The point made is, that the court erred in directing the jury as to the measure of damages. Without burdening this opinion with a quotation of the instructions, it is sufficient to say that the circuit court

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instructed the jury that, if they found for the plaintiff, in estimating his damages, *any permanent depreciation in the value of plaintiff's real estate*, occasioned by the discharge of the sewer thereon, might be considered. Defendant's contention is, that the damages, if any, to be recovered should be confined simply to the *loss of rents* up to the institution of the suit; that plaintiff is not entitled to recover in this action for such *depreciation in the value* of the inheritance which may have been occasioned by defendant's wrongful acts.

"The rule for measuring damages is that which aims at actual compensation for the injury, and that whatever ascertains this is proper evidence to be submitted to the jury." 3 Sutherland on Damages, p. 404. Now in the case at bar, evidence went to the jury that because of the construction of the sewer, the filth from the University was precipitated onto Babb's premises; that by reason thereof the tenants became sick (some died); the premises were abandoned; the reputation of the property suffered; people refused to rent or occupy the premises, as they were generally considered sickly."

Witnesses testified that the value of the property in the market was depreciated; that by the creation of this nuisance the salable value of the real estate was much less than it was before; that even after the discontinuance of the use of the sewer by the University people the influence, thus occasioned by the construction of the sewer, continued to operate on the property and to disparage its value. A *permanent injury to value* was thus shown, and will it be said, that for this injury so inflicted by defendant's wrongful act, plaintiff has no remedy? This is not a case where the injuries, resulting from the nuisance, stop with the existence of the nuisance, as in *Pinney v. Berry*, 61 Mo. 359, but rather a case similar to *Givens v. Van Studdiford*, 4 Mo. App. 498, approved in 72 Mo. 129, 86 Mo. 149. In the case last cited plaintiff Givens was permitted to recover damages

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for depreciation in value of his house in St. Louis where the value had been disturbed by reason of his neighbors renting an adjoining building to bawds—to be used as a house of prostitution—thereby impairing the good name of the plaintiff's premises and diminishing the market value thereof. The court there held the bawdy-house a private nuisance, announced it as "unquestionably that if a brothel is kept adjoining the tenement of another, by reason of which his tenants leave, and his property is depreciated in value, he may maintain an action for the special damage thus done his private property."

We think then that the lower court was correct, in thus permitting any permanent depreciation in the value of plaintiff's real estate (which was occasioned by the nuisance complained of) to be considered by the jury in making up the *quantum* of damages. If the testimony introduced by the plaintiff is to be credited (and the jury seem to have given it weight) then the wrongful acts of the defendant operated seriously against the property rights of plaintiff, and it becomes the duty of the court to see to it that the losses thereby occasioned be compensated, not only by requiring payment for the *loss of rents*, but as well payment for such *permanent losses* done to the value of the freehold.

We have considered all the points urged for the reversal of this cause, and have here given expression to our views of such points as we deem important; and it follows from these views that the judgment of the circuit court should be affirmed, and with the concurrence of the other judges it is so ordered.

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WILLIAM AND HENRY LEITCH, Appellants, v. ANN MILLER, Respondent.

Kansas City Court of Appeals, March 31, 1890.

1. **Arbitration and Award:** PREJUDICE OF APPRAISER: RESCISSION OF CONTRACT: VACATION OF AWARD. L. sold M. a lease, and it was agreed that three appraisers should fix the price. The appraisers fixed the price and made it in two payments, the first of which M. paid, but refused to pay the second. L. then sued to recover the second payment. M. pleaded that one of the appraisers was prejudiced and the award was void. L. demurred and relied on the ground that the answer did not allege a return of possession of the leasehold. *Held:* (1) The answer was not an effort to rescind the contract, but was a defense within the contract. (2) It was as completely a feature of the submission to these appraisers, that each should be unbiased and unprejudiced, as if it had been so written in the body of the instrument. (3) The misconduct of one of the appraisers effectually vacates the entire award.

2. ——: ——: WAIVER: INSTRUCTION. An instruction telling the jury in effect, even though they should find the appraiser had prejudged the cause, yet, if they further find that defendant, previously to the hearing, knew of such prejudice and suffered the hearing to proceed, they would find for the plaintiffs, is all, if not more, than was warranted in this case.

3. **Appellate Practice:** EQUITY V. LAW: OBJECTION. The objection that the issues in this case were of equitable cognizance, comes too late in the appellate court, as plaintiff submitted without objection to the manner of the trial below.

4. **Action at Law:** DEFENSE. This is not an equitable proceeding, but properly an action at law, and the answer contained but one defense, partiality of the appraisers.

Appeal from the Clay Circuit Court.—HON. J. M. SANDUSKY, Judge.

AFFIRMED.

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J. E. Lincoln and *D. C. Allen*, for the appellants.

(1) This is a suit on a contract for sale of a lease, at a price to be fixed by "appraisers." *Leonard v. Cox*, 64 Mo. 34. And the contract is an entirety, the consideration for one part being the consideration for every part. 3 Amer. & Eng. Ency., p. 916, and numerous cases in note 93. (2) The court erred in overruling the plaintiffs' "demurrer," and in admitting evidence on part of defendant, because: *First.* Said answer did not allege defendant was injured or damaged by said supposed "bias" or "prejudice." *Second.* Said answer proposed to cancel a part of said contract (alleged to be fraudulent), and leave part of it standing, and did not propose to put plaintiffs in "*statu quo.*" This she cannot do. All the authorities agree as to this. 75 Mo. 563; 66 Mo. 224 and 519; 18 Mo. App. 120; 1 Denio, 74; 19 Pick. 300; 17 N. E. Rep. 918. (3) The court erred in giving the instructions asked by defendant and in refusing those asked by the plaintiffs. By giving and refusing said instructions, the court confined the jury to the single question of "bias" or "prejudice" of the appraisers. Neither "fraud," bias nor prejudice would permit defendant to repudiate the "finding," while she held what she received under it. 18 Mo. App. 123; 75 Mo. 563; 19 Pick. 300; 1 Denio, 74; 1 Benj. on Sales, p. 530; 98 Ill. 188; *Gay v. Alter*, 102 U. S. Rep. 79, and cases cited above. (4) The court erred in modifying instruction number 6, given for plaintiffs. If defendant's agent had knowledge to put him on inquiry, he cannot complain. *Fox v. Hazleton*, 10 Pick. 275; 38 Ohio St. 423; 57 N. H. Rep. 20. (5) The answer of defendant is equitable and not legal. It specifically attacks the so-called award, and, alleging that it was not binding on defendant, prays that it "be set aside and for naught held and considered;" in other words, be canceled. The answer

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is a cross-bill and converted the case into an equitable proceeding. Bliss on Code Pleading [2 Ed.] sec. 10, p. 10; sec. 347, p. 349; *Freeman v. Wilkerson*, 50 Mo. 554, but see first paragraph on p. 556; *Smith v. Canning Co.*, 14 Mo. App. 525-526. (6) The judgment in this case is on the record erroneous. The answer had two pleas. The first plea was a general denial and plaintiffs introduced full evidence as to all issues tendered by the petition. In case where there are several pleas, a verdict, if for the defendant, must show on which of the pleas it was rendered. The same rule prevails as to pleas as holds where there are several counts in the petition. In this case the evidence was not confined to one plea. The verdict simply finds the issues for defendant without reference to pleas. *Railroad v. Freeman*, 75 Ga. 331; *Bricker v. Railroad*, 83 Mo. 39; Missouri Reports, *passim*. (7) The rule in reference to separate trials where there is a count at law and one in equity is the same in principle as in the case where there is a plea at law and a plea in equity. Here there was a plea at law and one in equity, and hence there should have been separate trials and separate judgments. The judgment in this case is, therefore, erroneous on the record. *Crowe v. Peters*, 63 Mo. 429.

J. V. C. Karnes, *H. F. Simrall*, *Sam'l Hardwicke*, for the respondent.

(1) The plaintiffs owned a leasehold in this property. The defendant desired to have this surrendered. The amount which the defendant should pay therefor could not be agreed upon. There was no controversy which could be the subject of an action. It was simply agreed that the three parties named should fix the value of this leasehold. It was an appraisal and not an arbitration. *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; *Zallee v. Ins. Co.*, 44 Mo. 530;

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Holmes v. Shepard, 44 Mo. 600, 603; *Leonard v. Cox*, 64 Mo. 32. Whatever may be held in other states, this is the settled law of this state; but the principles governing both are the same. In a similar case to this under a similar statute, the courts of Massachusetts have decided the same way. *Hubbell v. Bissell*, 13 Gray, 298, and cases cited. (2) The antecedent cause of action was for the value of the leasehold surrendered to the defendant. This has not been determined by the judgment of the court, nor was it inquired into on the trial. All evidence as to the real value of the lease was properly excluded. The suit was for a specific value as fixed by appraisers. The answer was that the appraisement was made void for the reason that the appraisers were prejudiced, and that hence there was no appraisement made and no recovery could be had thereon. It was purely an action at law with an equitable defense. (3) "The plaintiff is entitled either to the amount fixed by the appraisers, or to the value of his property which passed into the hands of the defendant." *Leonard v. Cox*, 64 Mo., *supra*. (4) "Where the award is void resort may be had to the original cause of action, which will not be treated as having been barred or merged or in any other way destroyed." Morse on Arbitration, p. 491; *Zallee v. Ins. Co.*, 44 Mo. 530, *supra; Mayor v. Butler*, 1 Barb. 325, 337; *Haggart v. Morgan*, 5 N. Y. 422; *Morton v. Cameron*, 3 Robertson, 189; *Barrows v. Sweet*, 143 Mass. 316; *Keller v. Harding*, 23 Ark. 697. (5) If the appraisers were partial or prejudiced, then the appraisement was void. Morse on Arbitration, pp. 106, 107, 108; *Strong v. Strong*, 9 Cush. 560; *Hyeronimus v. Allison*, 52 Mo. 102. "Where there are several arbitrators, misconduct on the part of any one of them will suffice to avoid the award of all. Morse on Arbitration, p. 536. And receiving *ex parte* communications will invalidate the award. Morse on Arbitration, p. 534. "There may be ample misconduct in a legal sense to

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make the court set aside an award, even where there is no ground for imputing the slightest motives to the arbitrator." Russell on Arbitration [3 Ed.] pp. 654, 655. (6) The answer is (1) a general denial except as admitted; (2) an admission of the lease—that it was surrendered—by plaintiffs to defendant at her reqnest and that the amount to be paid by her for it was to be ascertained by appraisers; that such ascertainment was undertaken, but the proceeding was void by reason of the partiality of the appraisers. "The defendant may plead as many defenses as he may have, legal or equitable, or both." *Ledbetter v. Ledbetter*, 88 Mo. 60. An equitable defense to an action at law does not convert the latter into a suit in equity nor deprive the plaintiff of his right to a jury trial. *Wolff v. Schaeffer*, 4 Mo. App. 367, 372; *Wolff v. Schaeffer*, 74 Mo. 154; *Carter v. Prior*, 78 Mo. 222. But, even if this be such a defense as ought to have been submitted to the jury on special issues, the appellants are in no position to take advantage of this, as they presented no such issues and made no objection to submitting the whole case to the jury. Attention must be given to such matters at the proper stage of the trial. *Estes v. Fry*, 94 Mo. 266, 271. (7) No rescission is sought in this case, and hence there can be no question as to restitution. This is entirely a mistaken view as to the issues involved.

J. E. Lincoln and *D. C. Allen*, for the appellants in reply to respondent's brief.

Counsel say: "No rescission is sought in this case," etc. "The contract is a "fraud" and void and that we don't propose to rescind nor stand by it." They must do one or the other. *Estes v. Reynolds*, 75 Mo. 563; *Nauman v. Oberle*, 90 Mo. 669; *Finlay v. Bryson*, 84 Mo. 669; *Parker v. Marquis*, 64 Mo. 41; *Masson v. Boret*, 1 Denio, 73; 19 Pick. 300; 1 Benj. on Sales.

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Gill, J.—In February, 1888, plaintiffs occupied a farm of two hundred acres as lessees of Mrs. Miller, the defendant, the lease expiring by its terms March 1, 1889, and at a rental of five hundred and fifty dollars per annum. About this time Mrs. Miller sold the farm, and agreed with the purchaser to give possession on March 1, 1888. With the view of complying with this undertaking defendant sought to arrange with the lessees, Leitch Bros., for a surrender of their unexpired term. The defendant's son, Dr. Miller, represented her in the entire transaction; and after some negotiations agreed upon terms with Leitch Bros. to the effect, in substance, that said plaintiffs would surrender possession of the farm on March 1, 1888, in consideration of which defendant would pay plaintiffs such a sum as should be fixed by Aaron Elliott, W. H. Roush and James Roberts. This agreement for appraisement was evidenced by a writing, signed by the parties, and in form as if an *arbitration* under the statute. On February 18, 1888, these appraisers met at Liberty, and, after consultation, submitted their decision, by which defendant, in addition to some attorneys' fees, was to pay plaintiffs for their unexpired leasehold of one year the sum of eighteen hundred and fifty dollars; nine hundred and twenty-five dollars to be paid March 1, and the remaining nine hundred and twenty-five dollars, on June 1, 1888. Defendant paid the amount due March 1, as provided for; but, on maturity of the last installment of nine hundred and twenty-five dollars, she refused further payment. Whereupon plaintiffs instituted this suit for the recovery of this said last installment, basing their action upon the terms of the contract above mentioned. The cause was tried in the Clay circuit court before a jury, a verdict and judgment had for the defendant, and plaintiffs prosecute this appeal.

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At the trial the defense relied on was that one of the appraisers, Elliott, was partial to the plaintiffs, and had prejudged the matter he was expected to hear and decide impartially; and that, therefore, the award so made was void.

I. This prejudice and bias of Elliott was fully set out in the answer, to which plaintiffs interposed a demurrer, on the grounds that said answer contained no defense, etc. The point, seemingly relied upon for this objection to the answer, is that it is not alleged therein that defendant had restored plaintiffs to the possession of said leasehold; that in order to *rescind* the contract entered into between the Leitches and Mrs. Miller, she must first surrender or return to them all she received on that account, to-wit, the possession of said premises. To support this contention the learned counsel for plaintiffs rely upon the line of decisions of which *Cahn v. Reid et al.* (18 Mo. App. 115) is a sample, wherein it is held that where one seeks to rescind a contract for the sale of property and to recover the same, by reason of fraud and deceit practiced on the vendor, it is incumbent on the complaining party first to make tender of that he has received from such fraudulent vendee, so as to place such party *in statu quo.*

The principle announced in this line of cases, however, does not sustain the contention here. There is no effort by the defense in this case to annul, or rescind, the contract for the purchase of plaintiffs' lease. There is no claim of fraud or deceit in procuring the contract of sale of the lease. By consent of both parties to the agreement for sale and transfer of the lease, that has become to the extent of such transfer an executed contract, and this is an action for the purchase money. Defendant disputes the plaintiffs' right to recover the nine hundred and twenty-five dollars fixed by the appraisers, because of misconduct by at least one of

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the number. It was as completely a feature of the submission to these appraisers, that each should carry to the discharge of such duty an *unbiased* and *unprejudiced* mind, as if such a clause was written in the body of the instrument. The defense made by the answer is, that the price to be paid was not determined by *three impartial* minds, as contemplated by the contract, but that appraiser Elliott had before entering on such service prejudged the matter, and entertained a fraudulent design to inflate the amount to be paid by defendant beyond what should in justice be paid. The defense then was rather within than without the spirit and intent of the contract; was not a defense by *rescission* of the contract, but rather for a just enforcement thereof. It is well established, too, that the misconduct of *one* of these appraisers effectually vacates the entire award, and for one good reason, among others, that it cannot be determined how far the *one* may have influenced others. Morse on Arbitration and Award, p. 537.

II. It seems that in the selection of these appraisers, Dr. Miller, defendant's agent, at first objected to Elliott, expressing at the time some doubt as to his (Elliott's) honesty. There was, too, evidence at the trial tending to show that, previous to the hearing had by the appraisers, Elliott was interviewed by one of the plaintiffs, and Elliott was then assured that "if he would stand by the plaintiffs they would stand by him, and would make him a nice present," etc. It seems, too, that Elliott went to Dr. Miller and related this circumstance, telling Miller that if selected he meant to do just what was "square and right," and encouraged Miller to believe that he, Elliott, would not be influenced to do wrong, etc. Thereupon, Miller, trusting that his mother would be fairly treated, permitted the hearing and appraisement to proceed, without objection.

Upon this state of facts plaintiffs at the trial asked the court to give an instruction to the jury to the effect

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that, even though the said Elliott was biased or had prejudged said cause, yet, if Miller had previous notice of such bias, *or had such notice as to put him, while acting as a prudent person, on inquiry*, then the jury should find the issues for the plaintiffs. The court refused the instruction as offered and gave in lieu thereof the following: "Even though the jury should find from the evidence that said Aaron Elliott was biased, or had prejudged such cause, yet, if the jury further find from the evidence that defendant, by her agent, E. H. Miller, previously to the hearing of said matter *knew* of the partiality, bias or prejudgment of said Aaron Elliott, and she suffered the hearing to proceed they will find the issues for the plaintiffs." Of this action by the court plaintiffs have no cause to complain. The instruction thus given by the court was all, if not more than, was warranted in this case. It may be well doubted if there was evidence sufficient to warrant the instruction as asked, even to admit its correctness as an abstract proposition of law, since the information received by Miller was calculated to encourage him to *trust*, rather than *suspect*, Elliott. However, it is only the *knowledge* of Elliott's bias that should have been construed as a waiver. Mere *suspicion* is not enough. *Robb v. Brachman*, 38 Ohio St. 425; *Noyes v. Gould*, 57 N. H. 20; 14 Pick. 236; 2 Met. (Mass.) 558, and 10 Pick. 277.

III. The alleged error, that the issues in this cause were, by force of the answer filed, of equitable cognizance and should have been settled by the court as in trial of equity cases, is of no consequence at this stage of the litigation. If the lower court was proceeding improperly plaintiffs should have interposed an objection. But they submitted, without objection, to the manner of trial and it is now too late to complain. *Estes v. Fry*, 94 Mo. 266.

However, plaintiffs' counsel are clearly wrong in this contention. This is an action on a contract for the

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recovery of money therein stipulated to be paid,—is an *action at law*, with a defense interposed that the appraisers, therein named to fix the amount to be paid, had not performed their duty as agreed, and had fraudulently inflated the amount of their findings to defendant's prejudice. It is not an equitable proceeding, but properly an action at law, the answer containing, too, but one count, one defense. The issue charged is partiality, bias and unfairness of one of the appraisers. The issue thus made was fairly tried and submitted to the decision of a jury upon evidence applicable thereto, and with instructions unobjectionable to either side, and we see no cause to disturb the jury's finding.

The judgment, therefore, of the circuit court is affirmed. All concur.

R. E. PRICE, Respondent, *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY, Appellant. 40 189 87 528

Kansas City Court of Appeals, March 31, 1890.

1. **Frauds and Perjuries:** ORIGINAL PROMISE: COLLATERAL PROMISE. In order to hold one for the price of goods delivered to another, in the absence of a writing, it is not only necessary to show a promise on his part, but it is requisite to show that the credit was given solely to the party making the promise; and if the party receiving the goods, or for whose benefit the promise was made, be himself liable at all (except it be a joint promise), the case falls within the statute of frauds. The promise in this case *held* under the evidence not original.

2. **Pleading:** RECOVERY. Plaintiff can recover upon no other cause of action than that upon which he declares.

Appeal from the Clay Circuit Court.—HON. J. M. SANDUSKY, Judge.

REVERSED.

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Pratt, *McCrary* and *Terry & Hagerman*, for the appellant.

(1) The collection by plaintiff from Gibbs of a portion of the check discharged defendant from any liability. *Mundorf v. Wickersham*, 63 Pa. St. 87; *Elwell v. Chamberlin*, 31 N. Y. 611; *Davis v. Krum*, 12 Mo. App. 279; *Norton v. Bull*, 43 Mo. 113; *Watson v. Bigelow*, 47 Mo. 413; Wharton on Agency, sec. 72. Our first proposition can be sustained upon the theory that Price could elect either to pursue the fund or hold the railroad, and having received a benefit from the fund is estopped from claiming that the payment to Gibbs was wrongful. 2 Herman on Estoppel & Res Adjudicata, pp. 1172, 1176, 1177, 1186; Bigelow on Estoppel [1 Ed.] 511; *Glass Co. v. Baldwin*, 27 Mo. App. 44; *Stoller v. Coates*, 88 Mo. 514. An election operates as an estoppel at law. Bigelow on Estoppel, 505. (2) There was an entire failure of proof as to the cause of action sued upon. The cause of action sued for is simply on an account for groceries sold to appellant. The proof shows that no goods were ever sold to appellant, nor did it ever promise to pay for the goods sold to Gibbs, the account of which is sued upon. The cause of action, if any existed against appellant, was for wrongfully paying to Gibbs money which belonged to respondent, that is, for a conversion. There is, therefore, an absolute failure of proof under the doctrine of *Carson v. Cummings*, 69 Mo. 325–332, and *Waldhier v. Railroad*, 71 Mo. 514. *Lumpkin v. Collier*, 69 Mo. 170, and *Scovill v. Glasner*, 79 Mo. 449. (3) If a promise binding the appellant personally can be found from plaintiff's testimony, then the transaction is within the statute of frauds. We do not believe that plaintiff's testimony can be construed as making a promise to pay for the goods sold to Gibbs. Even if it could be so construed, there can be no doubt about the promise being to answer for the

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debt of another. The goods were both delivered and charged to Gibbs. Afterwards Gibbs was treated as a debtor and paid part, if not all, of the account due. Upon the authority of *Rottman v. Fix*, 25 Mo. App. 571, and *Cahill v. Bigelow*, 18 Pick. 369. In such a case the test is, was any credit given to the person who obtained the goods, and if so the statute interposes a bar to a recovery. 3 Kent's Com. [6 Ed.] 123; *Swift v. Pierce*, 13 Allen, 136; *Bugbee v. Kendricken*, 130 Mass. 437; *Bryken v. Dohlende*, 27 Ala. 577, 581, 582; *Walker v. Richards*, 39 N. H. 259, 264, 265; 1 Reed on Statute of Frauds, sec. 95, and cases.

J. E. Lincoln and *R. W. McClelland*, for the respondent.

(1) The authorized acts of the agent bind the principal. *Baker v. Railroad*, 91 Mo. 152; 13 Mo. App. 221; 1 Waits' Act. and Def. 77; Bishop Cont. 411, sec. 1031. Parol contracts of an agent duly authorized will bind a corporation. R. S. 1889, sec. 2511. And the admission by defendant that Kelly was authorized to make contracts for provisions carries with it the admission that he was duly authorized. (2) While generally the books are the best evidence of whom the merchant charges, yet they are not conclusive. Abbott's Trial Evidence, p. 302, sec. 15; *Foster v. Persch*, 68 N. Y. 400. They may be explained, and any explanation consistent with the intention to give credit only to another may be shown. *Ib.; Champion v. Doly*, 31 Wis. 190; *James v. Spaulding*, 4 Gray, 451; *Burckhalter v. Farmer*, 5 Kan. 477; *Coal Co. v. Edwards*, 4 Hun. 432; *Fiske v. Allen*, 40 Sup. Ct. J. S. 76; *Lee v. Wheeler*, 11 Gray, 236; *Folsom v. Sheffield*, 53 Mo. 171; 1 Thompson on Trials, p. 642, sec. 840, and p. 352, secs. 398, 399; 1 Greenl. Ev., sec. 118, p. 164, and note. (3) This question of whether plaintiff proved his case may be dismissed with the further suggestion that defendant

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acknowledged the debt, when it accepted the fruits of the contract made by its authorized agent, on the first bill. Kelley's Treat. [Ed. 1881.] p. 179, sec. 192; 9 Pet. 607; 7 Hill, 128; 6 Pick. 198; 16 Ind. 56. Also when it accepted and paid the second bill to Gibbs, although sent in in plaintiff's name. The declaration of Kelly here to plaintiff, that bill was sent in in plaintiff's name, was proper. *Ingalls v. Averitt*, 34 Mo. App. 371; *McDermott v. Railroad*, 87 Mo. 285. (4) The error of the court below must be substantial. And where the instructions present the issue to the jury in a satisfactory manner, and there was no substantial error in admitting or rejecting testimony, this court will not interfere. *Crowley v. Gossett*, 32 Mo. App. 17.

Ellison, J.—Plaintiff sued defendant on an account for goods sold and delivered. He recovered below and defendant appealed. It appears that plaintiff was a grocery merchant, and that one Gibbs was a boarding-house keeper, who boarded section hands in the employ of defendant, and that one Kelly was section foreman. It was "admitted by defendant that section foreman Kelly had authority from defendant to make necessary arrangements and contracts with merchants, on defendant's account, for provisions for the men working under said foreman's control on defendant's road." Plaintiff furnished goods to Gibbs and received one payment through a check from defendant sent to plaintiff, and which included the amount of both plaintiff's and Gibbs' account up to the date of payment, both the accounts having been made out and sent to defendant in plaintiff's name. This action seeks to charge defendant on an original promise to pay for the goods. The statements of the agreement containing the promise as testified to by plaintiff are the following:

R. E. Price: "I am plaintiff. I was in business at Mosby at the time this account was made. Defendant at that time had a section foreman named Tom

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Kelly. One Gibbs had charge of a boarding house, and came in to buy goods on credit. I told him I had had trouble enough with other men, and, unless he would get Kelly and bring him in and agree to have the bills made out in my name, I could not let him have anything. I told Gibbs that he could not get any goods unless he made out his boarding-house account in my name and sent it in that way. He was to make out his bill in my name and send it to the company, and I was to take out what Gibbs owed me and pay the balance to Gibbs. When the arrangement was entered into, Gibbs called in my store about the time he bought out Booth, and I said I would not let him have anything before he made the kind of arrangement I referred to. That was before he bought any goods. That arrangement was that Gibbs' boarding-house account should be made out in my name and sent in to the company, and that the check should be made payable to me, and out of that I would pay my grocery account and then pay the balance to Gibbs. There was nothing in writing about it. This was the arrangement made between me, the section foreman and Gibbs." "The arrangement between me, Kelly and Gibbs was this: I refused to sell Gibbs goods, because I didn't think him responsible, and I wanted security; I was not going to sell to Gibbs alone. The arrangement was that my grocery bills were to be made out, then Gibbs' boarding-house account was to be made out in my name and sent to the company, and the check for it returned to me; then I would pay my grocery account out of the check and give the balance to Gibbs. The first month that was done, I took my pay and paid the balance to Gibbs."

Neither of these statements show a promise by defendant to pay for the goods furnished Gibbs. The agreement was that plaintiff and Gibbs' accounts were to be made out in plaintiff's name and sent in to

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defendant, and that then defendant would send a check for the amount to plaintiff that he might take out the amount of his account and turn over the balance to Gibbs. The evident meaning and understanding of the arrangement was, not that defendant was making an original promise to pay for goods in whatever amount Gibbs might purchase; but merely a promise to put plaintiff in a position where he could with certainty collect or secure his debt against *Gibbs*. In other words, defendant was giving to plaintiff the *security* that he, himself, states he wanted. It is true that plaintiff, in the course of his testimony, says that he "looked to the company for the pay," and that he "refused to let Gibbs buy goods on his own credit." Yet this does not vary the effect or scope of the defendant's explicit agreement to so place the money that it would secure plaintiff's claim against Gibbs. If defendant has violated its agreement, it does not follow that it can be held in an action on an original promise to pay for the goods.

In order to hold one for the price of goods delivered to another, in the absence of a writing, it is not only necessary to show a promise on his part, but it is requisite to show that the credit was given *solely* to the party making the promise. The relation of suretyship should not exist. And if the party receiving the goods, or for whose benefit the promise is made be himself liable at all (except it be a joint promise) the case falls within the statute of frauds. In other words, the person for whose benefit the promise is made must not be credited, and must not be regarded by the plaintiff as a *debtor*. His position must be such that he could not be held liable were an action brought against him for the debt. Browne Stat. Frauds, 197; *Swift v. Pierce*, 13 Allen, 136; *Bugbee v. Kendricken*, 130 Mass. 437; *Walker v. Richards*, 39 N. H. 259; *Rottman v. Fix*, 25 Mo. App. 571.

Applying this statement of the law to the facts in evidence as stated by plaintiff, we find that plaintiff

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certainly regarded Gibbs as his debtor. He sought him out, not without some difficulty; he called on the sheriff for assistance; he tried to get Gibbs to pay him and finally did collect ninety dollars of him which he applied on the account, stating that he would hold the defendant for the balance. In addition to this, the account he first opened on his books was against Gibbs, though he afterwards wrote defendant's name above that of Gibbs. While we will not say that this action on plaintiff's part is conclusive that he extended a part of the credit to Gibbs and that he looked upon him as liable for the account, it is at least very persuasive evidence that such was the case and that he did not look upon defendant's agreement as an original promise to pay for the goods. We are satisfied that plaintiff has no case upon the cause of action sued on, and it is well understood he can recover upon no other than that upon which he declares. *Sumner v. Rogers*, 90 Mo. 324; *Carson v. Cummings*, 69 Mo. 325.

We will, therefore, reverse the judgment. The other judges concur.

THOMAS M. MOORE, Respondent, v. T. M. THOMPSON, Appellant.

40 195 / 62 625 · 40 195 / 70 131 · 40 195 / 81 23 · 40 195 / 99 [1]133

Kansas City Court of Appeals, March 31, 1890.

1. **Chattel Mortgages:** MORTGAGEE PURCHASING AT HIS OWN SALE. The mortgagee cannot legally become a purchaser at his own sale, unless authorized or consented to by the parties in interest, and this, without regard to the *bona fides* of the sale or the fairness of the price, as the rule is intended not to remedy actual wrong but to prevent the possibility of it.

2. ——— : ——— : EQUITY OF REDEMPTION : SECOND MORTGAGEE. The surplus of the mortgaged chattels left after paying a first mortgage is pledged to secure the debt of a second mortgage, and is the

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property of the second mortgagee and not of the mortgagor, so that the latter's consent to the first mortgagee's purchasing at his own sale cannot cut off the right of the second mortgagee to redeem.

8. ——: EQUITY: CONVERSION: REMEDY. **When a court of equity has established the right to redeem, but the mortgagee has consumed or disposed of the property, so that it cannot be redeemed in kind, it may enter a personal decree against the mortgagee for the excess of the value of the property over the amount found due on the mortgage.**

Appeal from the Clay Circuit Court.—HON. J. M. SANDUSKY, Judge.

AFFIRMED.

Jno. W. Coots and *Jas. F. Mister*, for the appellant.

(1) Upon the finding of the facts, as made by the court in this cause, the judgment, under the law, must have been for the defendant. (2) It was not only competent to sell the property "in a lump," but under the circumstances of this case it was incumbent on Thompson to do it. The manner of the sale was according to the request of the owner of the property. The preponderance of evidence shows that the price obtained at the sale was a fair, if not a full, price. The only party entitled to complain of it—the mortgagors—are not only satisfied with it, but directed it at the time, and accepted the results of it; and respondent has been and is in no way prejudiced by it. *Binkendorf v. Vincenz*, 52 Mo. 441; *Chase v. Williams*, 74 Mo. 434–437; *Kelly v. Hurt*, 74 Mo. 572; *Mossman v. Bender*, 80 Mo. 585; *Woodlee v. Burch*, 43 Mo. 231–234; *Simrall v. Chaffin*, 48 Mo. 466; *Goode v. Comfort*, 39 Mo. 328. (3) Respondent neither offered to pay the prior mortgage debt before sale, nor to reimburse the purchase money paid for the property after sale; but practically refused to do either. *Norton v. Highleyman*, 88 Mo. 624. (4) Thompson cannot be held liable to Moore as trustee

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in this case, because it appears in evidence that the property sold did not pass into the hands of an innocent purchaser beyond the reach of Moore's mortgage, but was in the hands of Henson at the filing of suit, and at the time of trial. *Rutherford v. Williams*, 42 Mo. 34. Moore's remedy should have been replevin for the mules. *Christie v. Scott*, 31 Mo. App. 431; *Moore v. Ryan*, 31 Mo. App. 474; *McCandless v. Moore*, 50 Mo. 511. When there is an adequate and complete remedy at law a court of equity will not interpose. *Janney v. Spedden*, 38 Mo. 395. (5) The court erred in treating the sale of the mules under Thompson's mortgage, as void, merely because Thompson bought in the property at his own sale, or because the property was sold in a lump. *Haeussler v. Glass Co.*, 52 Mo. 452. The mortgagee in a chattel mortgage, after default made, or condition broken, is entitled to the possession of the property. *Woodlee v. Burch*, 43 Mo. 231–234; *Barnett v. Timberlake*, 57 Mo. 499. And Moore could not compel Thompson to permit him to redeem. *How v. Graham*, 21 Mo. 163; *Mullanphy v. Simpson*, 3 Mo. 492. (6) The petition of plaintiff does not state facts sufficient to constitute a cause of action against Thompson, and Moore is not entitled to the relief asked, because it appears from the petition that Moore is a second mortgagee; and that the sale under mortgage was void; and that Hensons, the mortgagors, still have the mules in possession, as owners, and it does not appear that the mules were ever (or are now) out of reach of Moore's second mortgage. (7) A judgment which has no substantial evidence to support it will be reversed on appeal. *Lionberger v. Pohlman*, 16 Mo. App. 392.

A. D. Burnes, *Jas. W. Coburn*, for the respondent.

(1) The second mortgagee stands in the place of the mortgagor as to redemption. Jones Chat. Mort. [2 Ed.] sec. 797, p. 654. (2) Mortgagee should sell each

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parcel separately, and, after realizing enough to satisfy his mortgage, is a trustee for the balance. Jones Chat. Mort. [2 Ed.] secs. 797, 798, p. 655; *Moore v. Ryan*, 31 Mo. App. 480; *Baker v. Halligan*, 75 Mo. 435. (3) Mortgagee cannot become the purchaser at his own sale. *Moore v. Ryan*, 31 Mo. App. 482; *Allen v. Ranson*, 44 Mo. 263; *Reddick v. Gressmore*, 49 Mo. 389. (4) When the mortgagee has consumed or disposed of the property, so that it cannot be redeemed in kind, the court may enter a personal decree against him for the excess of the value of the property over the amount found due him on the mortgage. Jones Chat. Mort. [2 Ed.] sec. 712, p. 586. (5) Replevin is not the proper remedy in this case. *Haeussler v. Glass Co.*, 52 Mo. 452. Neither is a suit to set aside the sale. *Moore v. Ryan*, 31 Mo. App. 482; *Medesker v. Swaney*, 45 Mo. 273. (6) The surplus belonged to the second mortgagee. *Schepplemann v. Feurth*, 87 Mo. 351; *Johnson v. Wilson*, 77 Mo. 639; *Orrick v. Durham*, 79 Mo. 174.

GILL, J.—This is a suit by the holder of a second mortgage against the first mortgagee, wherein the former seeks to charge the latter (to the extent of the former's debt against the mortgagor) by reason of an alleged misappropriation of the mortgaged goods by the defendant, first mortgagee. The cause was tried before the court, and the judge trying the same made a written finding of the facts coupled with the court's views as to the law of the case; and which, for the purpose of a brief and clear statement of the facts shown by the evidence, as well as the law governing the case, we here quote entire:

"Edgar Henson and George Henson executed two chattel mortgages—one to defendant, dated March 5, 1883, the other to plaintiff, dated November 15, 1888. Both mortgages were regular and were duly recorded. The defendant advertised the mortgaged property for

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sale March 4, 1889, the day on which the plaintiff's debt matured, and on that day sold four mules together for two hundred and fifty-five dollars. The defendant bid off the four mules at his own sale. His debt at that time amounted to one hundred and two dollars. He paid the excess over to the constable who cried the sale, and the constable paid this excess to the Hensons, the mortgagors. On the fifth day of March, 1889, the day after the sale, the plaintiff went to the defendant's house and stated to defendant that he came to pay off defendant's debt and expense and take the mules; the defendant demanded fifty dollars' damages, in addition to his debt, which the plaintiff refused to pay. Afterwards, on March 9, 1889, the defendant sold and delivered the four mules to Henson, and took his note for the purchase money (three hundred and five dollars), secured by chattel mortgage.

"The sale made by defendant to himself under the first mortgage was invalid, and did not cut off the equity of redemption of either the plaintiff or the Hensons. The Hensons, however, acquiesced in what was done, and received the money paid by the defendant over and above his debt, and afterwards one of them bought the mules from the defendant. The receiving of this money by the Hensons from the defendant at his sale was equivalent to a release by them to defendant of any claim or interest in the mules, but this mortgagee's sale did not cut of the equity of redemption of the plaintiffs, and on the day succeeding the sale, when he proposed to pay off the defendant's claim, he had the legal right to do so. The refusal of the defendant to permit him to redeem without the payment of fifty dollars' damages was wrongful, and when he afterwards, on March 9, 1889, made a sale and delivery of the mules to Henson, after denying plaintiff's right to redeem, he became liable to plaintiff for the value of the mules over and above his debt, there being no evidence as to any

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expense legally incurred by the defendant. The mules at public sale brought two hundred and fifty-five dollars; at private sale, a few days afterwards they sold for three hundred and five dollars. There are three witnesses estimating the value of the mules at from two hundred and forty to two hundred and sixty dollars, and three witnesses estimating their value at five hundred dollars. The mules were from twelve to fifteen years old—some of them had defects. Estimating the value of the mules at three hundred and five dollars, and defendant's debt at one hundred and two dollars, it leaves a balance of two hundred and three dollars, for which plaintiff is entitled to judgment.

"While plaintiff might have maintained a simpler remedy under his mortgage, we are not prepared to say that the remedy sought by the petition in this case cannot be maintained.

"In Jones on Chattel Mortgages [2 D. Ed.] section 712, it is said:

"'When a court of equity has established the right to redeem, but the mortgagee has consumed or disposed of the property, so that it cannot be redeemed in kind, it may enter a personal decree against the mortgagee for the excess of the value of the property over the amount found due on the mortgage.'

"JAMES M. SANDUSKY, Judge."

I. Upon reading and considering the evidence, we feel entirely satisfied with the foregoing finding of facts, as well as the result reached, as shown by the judgment entered thereon. The learned judge, trying the cause, has found a legal fraud to have been done the plaintiff. The evidence fully justifies this conclusion, if not to warrant the charge of *actual* fraud. Thompson *knew* of the existence of plaintiff Moore's claim and mortgage on the four mules. *Knew* that Moore was seeking and demanding payment from the Hensons, since Moore had given him written notice

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thereof by letter dated February 13, 1889; and, yet, in the face of these facts, Thompson, at a sale under his mortgage, on March 4, 1889, offered and sold at public sale, "in bulk," all four mules, and *himself* became the purchaser at his own sale. The evidence conclusively shows that to pay Thompson's balance against Hensons (being only one hundred and two dollars) the sale of *one* (at most not more than *two*) of the four mules would have been sufficient, yet he sells the entire bunch at one sale, realizing nearly three times the money needed, and thereby shutting off the plaintiff Moore's rights in the remainder. The evidence, it is true, shows that Henson consented to this sale of all four mules "in bulk," and the result indicates the purpose of such consent, since he was to buy from Thompson, the purchaser, the same mules, freed, as he thought, from Moore's mortgage. However, Hensons had no authority to consent away the rights of the subsequent (second) mortgagee. Moore was the mortgagee of the equity of redemption in those mules, and a sale of more than was sufficient to pay the prior mortgage was an outrage on *his* rights, since it affected the security for his debt. The surplus of the mortgaged chattels left after paying the prior incumbrance, was pledged to secure Moore's claim, and to the extent of his debt, was his property, and not Hensons. 2 Jones on Mort., sec. 1921; *Reid v. Mullins*, 43 Mo. 306; *Strawbridge v. Clark*, 52 Mo. 21.

II. So, too, as stated in the opinion of the circuit judge, the sale by Thompson to himself was invalid, as to Moore, the subsequent mortgagee. Jones on Chat. Mort., sec. 806. The mortgagee cannot legally become a purchaser at his own sale, unless authorized or consented to by the parties in interest.

"It matters not, in the application of this rule, that the sale was *bona fide*, and for a fair price. The rule is not intended to remedy an actual wrong, but is

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intended to prevent the possibility of it," says the author last cited.

This plaintiff never consented or agreed that Thompson, the prior mortgagee, might purchase the mortgaged mules, sold at his own sale. Hence, plaintiff had still, after such sale, the right of redemption, and he attempted to exercise that right; but it was refused by defendant, who sold the mules and appropriated the proceeds to his own use. Having then converted the mortgaged property, the defendant became liable for its value after the payment of his own debt. He held the property, and proceeds in trust, first, for the payment of his balance of one hundred and two dollars and the remainder to be applied on the claim of this plaintiff. Jones on Chat. Mort., sec. 798; *Rutherford v. Williams*, 42 Mo. 34; *Moore v. Ryan*, 31 Mo. App. 474.

We see no reason to discuss some other questions, merely technical, raised in counsel's brief. The judgment is clearly for the right party, and is affirmed. All concur.

CLEMENS HESS, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Carriers: NOTICE OF DAMAGE: WAIVER.** A contract of shipment required that the plaintiff, in case of damage in transportation, would, in twenty-four hours after arriving at the point of destination, give notice thereof in writing verified by affidavit to some general officer of the defendant, etc. The plaintiff within such time handed an unverified letter containing an account of his loss to defendant's general freight agent, who received the same, made no objection thereto, either as to form or substance, and promised to look up and adjust the claims. *Held*, this was sufficient notice and a waiver of the requirement that it should be sworn to.

2. **Evidence:** REPORT OF SALE: HEARSAY. An account of sales rendered by plaintiff's commission merchant, containing the prices obtained and the weight of cattle sold, is hearsay and incompetent evidence.

Appeal from the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

Wm. S. Shirk, for the appellant.

(1) The court erred in admitting in evidence the letter from Mulhall & Co., dated January 19, 1885, directed to the Missouri Pacific Railway Company. *First.* It was in no sense of the term a notice of his claim for damages for injury to the stock, as required by the terms of the sixth clause of the contract under which they were shipped. Nor is it sworn to. *Second.* Said letter is full of mere hearsay statements, and statements of facts about which said Mulhall & Co. had no personal knowledge—these statements were not made under judicial sanction, nor even under the sanction of an oath. Mulhall was a competent witness, and should have been produced. His unsworn statements, as to material facts, were not evidence. (2) And it was error to admit in evidence the account of sales for the same reasons. The account amounts to nothing but the unsworn declarations of Mulhall & Co., as to prices, weights and expenses. These declarations were as to material matters, as to which Mulhall & Co. were competent witnesses. Nor does the fact that Hess swears that the cattle were sold for the prices, and at the weights indicated on the account of sales, make it admissible. Hess' evidence may tend to establish the correctness of Mulhall's figures, but it does not take from the account its character of unsworn declarations, nor render it admissible in evidence. *Hoskins v. Railroad*, 19 Mo. App. 315, on 318.

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G. W. Barnett and *Louis Hoffman*, for the respondent.

(1) (*a*) The Mulhall letter and account of sales, being attached, constituted one instrument. and they together being the notice, that respondent gave appellant as required under the contract, were clearly admissible in evidence for the purpose to show that respondent did give notice and what the notice consisted of, and they were offered for that purpose only. (*b*) The fact that the notice was not sworn to and all other defects and irregularities in the notice were clearly waived by appellant, by the words and conduct of appellant's general freight agent in St. Louis when he made no objections to the form of the notice and by stating to respondent Hess that "he would see it attended to and would see that I was paid for the loss." Also that "they made a copy of the notice and made no objection because the notice was not sworn to." *Rice v. Railroad*, 63 Mo. 314; *Oxley v. Railroad*, 65 Mo. 629; 55 Mo. 181; 73 Mo. 371; *Dobbins v. Edmonds*, 18 Mo. App. 307; *Gale v. Ins. Co.*, 33 Mo. App. 664; *Travis v. Ins. Co.*, 32 Mo. App. 198; 87 Mo. 62. (*c*) The objection that the notice was not signed by Hess is not well taken, for the reason that the evidence is uncontradicted that Mulhall was agent for Hess, and that Hess and Mulhall went together to the freight agent. Moreover, this objection comes too late at the trial; it should have been made at the time the notice was presented. *Breckenridge v. Ins. Co.*, 87 Mo. 62; *Parks v. Ins. Co.*, 26 Mo. App. 511; 55 Mo. 181; 73 Mo. 371. (2) (*a*) All hearsay evidence touching the market value was excluded by the court. (*b*) Hess was a competent witness to testify touching the market value for the reason, as the evidence shows, he had acquainted himself concerning the market values by inquiring

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among commission merchants, examining the newspaper market reports, the price currents, and examining the market in St. Louis. Abbott's Trial Evidence, pp. 309 to 311, secs. 22 and 23; *Whitney v. Thacher*, 117 Mass. 527; *Sisson v. Railroad*, 14 Mich. 489; *Railroad v. Perkins*, 17 Mich. 296; *Lush v. Druse*, 4 Wendell, 313; *Cliquot v. U. S.*, 70 U. S. [3 Wall.] 117; *Fenerstein v. U. S.*, 70 U. S. [3 Wall.] 121.

Gill, J.—Plaintiff had judgment against the defendant in the circuit court for the sum of nine hundred dollars, as damages for delay in transporting some seventy-three head of cattle from Lincoln, Missouri, to St. Louis, Missouri. Plaintiff claims that the defendant received said cattle on January 14, 1885, and agreed to carry and deliver the same at St. Louis on the morning of the fifteenth of January; but that said cattle were not delivered at St. Louis till the evening of the seventeenth, and, on account of such delay, the cattle lost much in weight, and, besides, they were cast upon a much lower market than if carried through as agreed.

I. In addition to a general denial, the answer sets out the terms of a written, or printed, contract of shipment, made and signed by the plaintiff, the portion thereof relied on in defense being that, in case of damage in transportation, etc., that the plaintiff would, within twenty-four hours after arriving at the point of destination, give notice thereof in writing, verified by affidavit, to some general officer of the defendant, or its nearest station agent. And defendant alleges that no such notice was given.

At the trial of the cause, the plaintiff identified a letter as written and signed by Mulhall & Co. at St. Louis, and directed to the defendant. Without comment here on the contents of this letter, we think it, in matter of substance, sufficient notice of plaintiff's claim for damages. It appears to have been written

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by Mulhall & Co. (plaintiff's commission agents) at plaintiff's request; that Mulhall and plaintiff, within the twenty-four hours, took said letter and delivered the same to the general freight agent at St. Louis, who received the same, made no objection thereto, either as to form or substance, and promised plaintiff in due time to look up the matter and adjust the claim. This was a waiver of the requirement that the notice should be sworn to. *Rice v. Railroad*, 63 Mo. 315; *Gale v. Ins. Co.*, 33 Mo. App. 664; *Breckenridge v. Ins. Co.*, 87 Mo. 63. We give it as our opinion, then, that the notice, being at the time satisfactory (at least not objected to), it is too late at the trial to raise such objections thereto as here insisted on.

II. The next point, however, as contained in brief of defendant's counsel, is well taken, and must result in a reversal of the judgment herein. The plaintiff offered, and the court admitted, over defendant's objection, the account of sales rendered to plaintiff by Mulhall & Co., commission men at St. Louis. This action of the court was clearly erroneous. It was the most obvious *hearsay*. It amounted to nothing more than a report, in writing, from plaintiff's agents, Mulhall & Co., to the effect that they sold the damaged cattle on the St. Louis market at the prices there named; that said cattle weighed as there stated, etc. Such a paper was incompetent as proof of such facts, and should have been rejected. Nothing short of the deposition, or evidence in open court, of some one connected with said business could be admitted to prove the matters contained in this statement of account. *Hoskins v. Railroad*, 19 Mo. App. 315. This error concerned, too, a vital question in this case, and is such as cannot be passed over as immaterial.

The result follows, that the judgment of the Pettis circuit court must be reversed, and the cause remanded for a new trial. It is so ordered. All concur.

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WM. M. PRICE *et al.*, Respondents, v. C. H. VANSTONE, Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Appellate Practice:** INSTRUCTIONS: MOTION FOR NEW TRIAL. Objections to instructions will not be considered when the trial court's attention has not been called to them in the motion for a new trial.

2. **Evidence:** CARLOAD: CUSTOMARY. In an action for damages for breach of contract to deliver so many carloads of wheat it is not error to admit evidence of what is customary to consider a carload of wheat.

3. ——— : CONTRACT PRICE AND PRICE AT DELIVERY. In such action it is proper to admit evidence of the difference between the contract price and the price of wheat on the day and at the place it was agreed to be delivered.

4. **Contract:** BREACH: INSUFFICIENT REASON. Defendant agreed to deliver to plaintiffs during August ten carloads of wheat. He delivered three carloads and drew his draft on plaintiffs for more than the three carloads came to. Plaintiffs paid what the three carloads amounted to and not the excess. Defendant notified plaintiffs the contract was at an end, as he would not ship wheat to any house that would not pay his drafts, whether they were for too much or not too much. *Held* the reason was insufficient, and it was not necessary thereafter for plaintiffs to tender the contract for the remainder of the wheat.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

Boyd & Sebree, for the appellant.

(1) The construction placed upon the written contract by the acts and conduct of the parties is that the defendant was to ship the wheat in such quantities

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as suited him by the carload; and that the plaintiffs were to pay cash for it as it was received. Defendant, when he shipped the three cars, drew on plaintiffs for the value of the three cars. Plaintiffs received the three cars after they knew that defendant expected cash when they were received. Plaintiffs' letters and petition in this case also show that plaintiffs so construed it, and such a construction not being repugnant to the writing should be recognized and enforced by the court. *Golden v. Wolf*, 6 Mo. App. 490; *Dobbins v. Edmonds*, 18 Mo. App. 307. (2) Under this contract the delivery of this wheat, and the payment of the purchase price, were to be concurrent acts, and, while the plaintiffs could have refused to accept any part until the ten cars were all offered, yet his acceptance of a part required a payment to the extent of the value of that part. And the plaintiffs, having received the three cars and failed to pay at time they were received, cannot recover in this case. Bish. on Cont. [Enlarged Ed.] sec. 1433; Benjamin on Sales [3 Ed.] sec. 592; *Bersch v. Sanders*, 37 Mo. 105. (3) The contract does not require a delivery in August. It provides that the wheat was to be shipped in August from Marshall, and was to be inspected or graded in St. Louis, and weighed in St. Louis. The measure of damages, therefore, was not the difference between price named in the contract and value on August 1. Under the contract it could not be delivered on track at Marshall, and that clause of the contract which fixes price, seventy-four and one-half cents, on track at Marshall, means that the price should be seventy-four and one-half cents and freight charges to St. Louis. (4) While plaintiffs were not bound to pay defendant's draft if for more than the value of the wheat, he was bound to pay the value of the wheat or tender it, and this he did not do. The instructions given for plaintiffs do not state the law of this case, and are not supported by the evidence.

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Leslie Orear, for the respondents.

(1) No review can be had in this court as to declarations of law given by the court below, as the action of the trial court in that particular was not assigned for error in the motions for a new trial. *Gaines v. Fender*, 82 Mo. 497; *Griffin v. Reagan*, 79 Mo. 73; *Schlicker v. Gordon*, 19 Mo. App. 479; *Ins. Co. v. Schultz*, 30 Mo. App. 91. (2) The construction of the contract sued on is for the court, and it must be construed as having the legal effect given it by the parties, which must be gathered from the instrument itself in the absence of ambiguous terms. 2 Parson's Contracts [6 Ed.] pp. 491, 494, 499, 500; *Brewing Co. v. Water Co.*, 34 Mo. App. 49. (3) Appellant does not complain that the respondents did not pay for the wheat actually shipped under the contract at the time it was delivered, received and accepted by the respondents, but, on the contrary, refuses to perform his contract, because respondents refused to pay his draft, even though the wheat actually shipped did not cover the draft. (4) The vendor having put it out of his power to perform his contract by loading and shipping the wheat to other parties, and informing plaintiffs that he did not intend to ship them the wheat, and that they might consider the contract ended, made a tender of the purchase price unavailing and unnecessary. *Lumber Co. v. Warner*, 93 Mo. 374; *McManus v. Gregory*, 16 Mo. App. 375. (5) The defendant, after having accepted the settlement for the value of the three cars wheat shipped, expressed himself satisfied with it, and notified respondents that he was loading the balance due on contract, and thereby waived any objections he may have had to plaintiffs' refusal to pay his overdraft.

Ellison, J.—The defendant on the thirty-first day of July, 1888, entered into a contract with plaintiffs, whereby he sold to them ten cars of number 2 wheat to

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be shipped in August, 1888, at seventy-four and one-half cents on track at Marshall, Missouri, St. Louis weight and grade. The grain to be loaded and shipped *via* the Chicago & Alton railroad and billed to Price-Grimm Commission Company, St. Louis, Missouri, care of Merchants' Elevator. It appears that there was another contract between the same parties for a ten-car lot of wheat, and that under the contract sued on appellant shipped three cars of wheat with two others, which last-named cars were applied on the former contract. That at the same time he made this shipment defendant drew a draft against it for nineteen hundred and twenty dollars, and attached it to the bill of lading, which draft and bill of lading were sent to the Commercial Bank of St. Louis for collection, and was presented and payment demanded before the wheat was received, payment was refused, because the draft was too much, and because defendant had left no margin for shortage. That after the wheat was inspected and weighed according to the contract plaintiffs called at the Commercial Bank holding the draft and bill of lading, and paid the whole amount due for the wheat actually shipped and received, to-wit, $1886.75. That the settlement so made was by the direction and instructions of defendant Vanstone, and that at the time he gave such instructions to the bank, viz.: On the fifteenth of August, 1888, he informed plaintiff that he was loading the balance of wheat due on the contract on that day. On the eighteenth day of the same month Vanstone notified plaintiffs that he did not intend to ship any more wheat under his contract, and assigned as a reason therefor that he would not perform his contract because plaintiffs "would not take up his drafts whether they were too much or not;" and because "even if the shipment did not cover the drafts he wanted them paid anyhow." That, upon such refusal of the defendant to perform his contract, plaintiffs made demand on defendant to ship

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the wheat upon the terms of his contract, and, upon the failure of defendant to do so, this suit was brought and on the trial plaintiffs had judgment.

Defendant at the close of plaintiffs' case offered no evidence in his own behalf, but asked an instruction in the nature of a demurrer to the testimony introduced by plaintiffs, which was refused. Instructions were given for plaintiffs and objections are made to them here. We will not consider these objections for the reason that the court's attention was not called to them in the motion for new trial.

There appear to be two objections entered as to the admission of evidence on the part of plaintiffs: One that the evidence of what was customary to consider as a carload of wheat was "irrelevant," was properly overruled, as such evidence tended to show the amount of bushels defendant failed to furnish and was a basis to ascertain damage.

The other objection went to the statement of a witness as to the difference between the contract price and the price of wheat on the last day of August. This objection was also properly overruled. Notwithstanding the wheat was to be weighed and paid for in St. Louis it became the property of plaintiff, under the contract, when delivered on the track at Marshall, and whatever it was worth at Marshall on the thirty-first of August more than the contract price, would measure plaintiff's damages. It was perhaps improper to ask as to the price in St. Louis on the thirty-first of August, but this was cured by showing, without contradiction, the same price on that day in Marshall, the place of delivery.

This leaves only the refusal of defendant's demurrer to the testimony. We are satisfied it was properly refused. The contract between the parties is as follows:

"MARSHALL, Mo., July 31, 1888.

"We have this day sold Price-Grimm Commission Company, of St. Louis, Missouri, ten cars of number 2

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red wheat, to be shipped in August, at seventy-four and one-half cents on track at Marshall, Missouri, St. Louis weight and grade. The grain to be loaded and shipped *via* the Chicago & Alton railroad, and billed to Price-Grimm Commission Company, St. Louis, Missouri, care of Merchants' Elevator.

"C. H. VANSTONE,
"By A. M. EHRNMAN."

Under this contract defendant shipped three carloads and drew a draft on plaintiffs for more than it came to under the contract. Plaintiffs refused to pay the drafts but did pay what was properly due. While defendant complained of this by letter of August fifteenth he did not controvert plaintiff's right in the matter. On the contrary he addressed plaintiffs three days thereafter the following letter:

"August 18, 1888.

"*Price-Grimm Commission Company, St. Louis, Mo.*

"GENTLEMEN:—Yours of the seventeenth to hand, and in reply will state that it is the most singular thing in the world that you will not pay my drafts on you. I do not aim to draw in excess, but if I should I want them paid anyhow. I will not do business with a house that will not take up my drafts, and you can consider the contract at an end. Will not ship wheat to any house that will not pay my drafts on them, whether they are too much or not too much. The thing is not at all satisfactory, and I am very much dissatisfied with your method of doing business. I have several cars loaded now, but I am not going to ship them to your house, and do not intend to ship you any more. I do not intend to have account sales sent to me through a bank. My wheat should all have graded 2, and not short in weights over three bushels per car.

"C. H. VANSTONE."

This letter put an end to the contract for the insufficient, though candidly stated, reason that plaintiffs

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would not pay drafts that were for more than was due. It was not necessary, after receipt of this letter at least, for plaintiffs to make a tender of the contract price for the remainder of the wheat.

On the whole case it is quite apparent the judgment is for the right party, and it is affirmed. All concur.

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100	[2]365

WILLIAM R. ROY, Appellant, v. W. C. BOTELER, Respondent.

Kansas City Court of Appeals, March 31, 1890.

1. **Pleading:** BUILDING CONTRACT: ARCHITECT'S CERTIFICATE: CONDITION PRECEDENT. A stipulation in a building contract that payment shall be made on the estimate and certificate of the architects is a condition precedent and should be pleaded, and its performance alleged and proved. But no special statement of facts showing performance is necessary; a general statement that the party has performed all the conditions of the contract on his part is sufficient under the statute of this state.

2. **Building Contract:** ARCHITECT'S CERTIFICATE, SUFFICIENCY OF: EVIDENCE. The contract required the certificate to be under the hand of the architects, and to show (1) that the whole job had been completed and accepted by the architects, (2) the final estimate by the architects of the amount due on the contract, and (3) that the work had been performed agreeable to the drawings and specifications under the direction and to the satisfaction of the architect. The certificate showed the balance due the contractor, but nothing more. *Held*, the certificate was in substance insufficient, failed to show the compliance with the contract.

3. **Pleading:** WAIVER: EVIDENCE: ARCHITECT'S CERTIFICATE. Under a general allegation of performance of all the conditions of a contract, evidence of a waiver of performance of such conditions is inadmissible, and the fact that an architect's certificate may have been made in a certain manner at the defendant's request cannot alter the rule; but modifications or alterations of the contract, and a waiver or estoppel must be pleaded.

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Appeal from the Buchanan Circuit Court. — HON. O. M. SPENCER, Judge.

AFFIRMED.

James C. Davis and *Vinton Pike*, for the appellant.

(1). The contract entitles plaintiff to final payment "when the whole job is completed and accepted." The petition alleges, but the court rejected our offer to prove, performance by plaintiff and acceptance by the defendant. The allegation stands admitted here. Acceptance by defendant implies performance by plaintiff of every condition precedent to a recovery, or a waiver by defendant of any unperformed condition. (2) Plaintiff's proceeding is well sustained by rules of practice. If the production of a certificate was a condition precedent, defendant could waive it, and proof of waiver sustains the allegation of performance. *Ins. Co. v. Kyle*, 11 Mo. 278–291; *Okey v. Ins. Co.*, 29 Mo. App. 110; *Travis v. Ins. Co.*, 32 Mo. App. 207, and cases cited; *Goldsmith v. Hand*, 26 Ohio St. 101–107; *Blood v. Enos*, 12 Vt. 625. Waiver in this case is a question for the jury. *Keller v. Oberreich*, 30 N. W. Rep. 524. (3) If performance has been hindered by defendant, he cannot complain of non-performance. Chitty on Contracts, 738; *Doyn v. Ebbesen*, 39 N. W. Rep. 535; *Doll v. Noble*, 22 N. E. Rep. 406; *Chism v. Schipper*, 16 Atl. Rep. 316; *Devlin v. Railroad*, 44 Barb. 87; *Camp v. Barker*, 21 Vt. 472. (4) Defendant through his agent Eckel made payments, without certificates, as the work progressed, and after its completion in excess of eighty-five per cent. When final payment was asked, if defendant gave any reason for refusing, it was not because of objection to the certificate. This brings the case within the rule of *Thomas v. Fleury*, 26 N. Y. 26–33, and *Whalen v. Boyd*, 6 Atl.

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Rep. 384, which hold that plaintiff in such state of case can recover without certificate. (5) The condition relied on by the defendant was contained in the contract, and not one imposed by law. Pleading performance thereof generally is sufficient. R. S. 1879, sec. 2079; 55 Mo. 584, and cases cited. It is when the condition is imposed by law that a general allegation is not sufficient, and performance must be specially averred. *Parks v. Heman*, 7 Mo. App. 17; *Jaccard v. Anderson*, 32 Mo. 190; Bliss, Code Plead., secs. 301, 302. (6) According to all the authorities, under the allegation of special performance upon the facts admitted here, plaintiff is entitled to recover, if the certificate had been unreasonably refused. "But when he had substantially performed his contract the architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal, on the part of the architect in such a case to give the certificate, dispenses with its necessity." *Nolan v. Whitney*, 88 N. Y. 648, and cases cited. (7) But the certificate furnished in this case was substantially what the contract required. It cannot be distinguished from the one approved in *Wycoff v. Meyers*, 44 N. Y. 145. Its execution was sufficient. *Snell v. Herf*, 84 Ill. 220. Not required to state building was completed. 92 Ill. 559. (8) There is no dispute as to the extra work, and the plaintiff, in any event, was entitled to recover for that. *Thomas v. Fleury*, 26 N. Y. 30.

B. R. Vineyard and *Thomas & Dowe*, for the respondent.

(1) The production by appellant of each certificate required by the contract is a condition precedent. *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 539; *Dinsmore v. Livingston Co.*, 60 Mo. 244; Law of Building and Buildings, Lloyd [1 Ed.] pp. 19, 20, 24, 25, 26, 27 and 79; *Packard v. Van Schoick*,

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58 Ill. 79; *Coey v. Lehman*, 79 Ill. 173; *Downey v. O'Donnell*, 86 Ill. 49; *McAuley v. Carter*, 22 Ill. 53; *Barney v. Silas*, 11 N. E. Rep. 206. (2) A condition precedent must be pleaded and its performance averred. *Dinsmore v. Livingston Co.*, 60 Mo. 244; *Stout v. St. Louis Tribune Co.*, 52 Mo. 347; *Basye v. Ambrose*, 32 Mo. 484; *Turner v. Mellier*, 59 Mo. 535; *City of St. Louis v. Cruikshank*, 16 Mo. App. 496; 1 Chitty's Pleading, p. 320, at bottom; *Bruen v. Ogden*, 18 N. J. Law, 126. (3) There can be no recovery on a special contract if the plaintiff has himself failed to comply with its terms. *Eyerman v. Cemetery Ass'n*, 61 Mo. 491; *Lowe v. Sinklear*, 27 Mo. 310; *Austin v. Keating*, 21 Mo. App. 34. In the absence of a waiver or of an unreasonable refusal on the part of the architect, there can be no recovery on the contract in this case by appellant, without first producing the certificates required by the contract. *Yeats v. Ballentine*, 56 Mo. 539; *Dinsmore v. Livingston Co.*, 60 Mo. 244; *Coey v. Lehman*, 79 Ill. 173; *McAuley v. Carter*, 22 Ill. 53; *Packard v. Van Schoick*, 58 Ill. 79; *Barney v. Silas*, 11 N. E. Rep. 206; Law of Building and Buildings, Lloyd [1 Ed.] p. 25. (4) The architects' certificates must comply with the requirements of the contract, otherwise no action can be maintained. Law of Building and Buildings, Lloyd [1 Ed.] pp. 24, 25. *Packard v. Van Schoick*, 58 Ill. 79; *Barney v. Silas*, 11 N. E. Rep. 206; *Wycoff v. Meyers*, 44 N. Y. 143, 144 and 145. (5) The contract produced and read in evidence by appellant is not the contract he has declared upon in his petition. *Bank v. Westlake*, 21 Mo. App. 572. The petition does not state facts sufficient to constitute a cause of action against respondent on the contract produced and read in evidence. *Brecheisen v. Coffey*, 15 Mo. App. 84; *Zooker v. Arnoux*, 76 N. Y. 400; *Bruen v. Ogden*, 18 N. J. Law, 126. (6) Evidence of a waiver of the performance of a condition precedent is

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not admissible under an allegation of performance. *Bank v. Westlake*, 21 Mo. App. 572; *Nichols, Shepard & Co. v. Larkin*, 79 Mo. 271; *Lanitz v. King*, 93 Mo. 518; *Mehurin v. Stone*, 37 Ohio St. 49. (7) The facts which appellant offered to prove would not, if proved, constitute a waiver of either condition of the contract relating to the architects' certificates. *Dobbins v. Edmonds*, 18 Mo. App. 316; *Nichols, Shepard & Co. v. Larkin*, 79 Mo. 272; *Dyas v. Hanson*, 14 Mo. App. 375; *Crouch v. Railroad*, 22 Mo. App. 319; *Ehrlich v. Ins. Co.*, 88 Mo. 255; *Smith v. Brady*, 17 N. Y. 173. (8) Extra or additional work done under subdivision third of the contract is performed under the contract and subject to all the terms and conditions thereof. *Chism v. Schipper*, 16 Atl. Rep. 316.

Smith, P. J.—This was a suit, brought on a builder's contract, to enforce a mechanic's lien for balance claimed to be due thereon. The petition, amongst other allegations, contained the following, to-wit:

Plaintiff complains of defendant, and for his cause of action states, that defendant is and at all times hereinafter mentioned has been the owner of a tract or parcel of land in the city of St. Joseph, county of Buchanan and state of Missouri, known and designated as lots 1, 2, 3 and 4, in block 3, in Wilson's addition to the city of St. Joseph aforesaid; that about the eighth day of August, 1887, the plaintiff and defendant entered into a contract by written articles of agreement, whereby the plaintiff covenanted, promised and agreed to and with the defendant to make, erect and finish, in a good, substantial and workmanlike manner, on the parcel of ground above described, a large two-story, double-brick tenement dwelling house, which has since its erection been known as Dr. Boteler's flats, by furnishing all the material and doing all the work therefor, except the brick work, brick material, painting and glazing; that

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is to say, plaintiff was to do all the carpenter work and furnish the materials therefor agreeable to the drawings and specifications provided for said work, to the satisfaction and under the direction of Messrs. Eckel & Mann, or either of them, who were the architects of defendant's said building, and whose approval of plaintiff's said work was to be testified by a writing or certificate under the hand of them, or either of them, all of which plaintiff agreed to do for the sum of thirty-two hundred dollars ($3,200), which sum the defendant then and there and by the contract aforesaid promised and agreed to pay plaintiff, in consideration of the performance of said contract on his part thereafter to be made. And plaintiff further states that he has duly kept and performed all the promises, covenants and agreements in said contract contained, on his part, to the satisfaction and under the direction of said architects.

The answer was a general denial, at the trial, the plaintiff introduced in evidence the builder's contract, which, amongst others, contained the following provisions, to-wit:

First. The said party of the second part does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, or his executors, administrators or assigns, that W. R. Roy, the said party of the second part, or his executors or administrators, shall and will, for the consideration hereinafter mentioned, without any unnecessary delay, and as soon as ordered, so make, erect, build and finish in a good, substantial and workmanlike manner, on the vacant lot situate on northeast corner of Thirteenth and Edmond streets in St. Joseph, Missouri, a certain job of carpenters' and joiners' work for a new brick building, containing four flats, to be built by the said party of the first part on the place aforesaid, and all to be agreeable

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to the drawings and specification signed by the said parties and hereunto annexed, to the satisfaction and under the direction of Eckel & Mann, to be testified by a writing or certificate under the hand of the said Eckel & Mann, and also shall and will find and provide such good, proper and sufficient materials, of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing all the carpenter and joiner's work as specified and mentioned in the specifications, for the sum of thirty-two hundred dollars ($3,200). Payments to be made as the work progresses, every two weeks, on the estimate of the architects, of which eighty-five per cent. is paid to contractor; balance, fifteen per cent., to be paid with final payment when the whole job is completed and accepted; provided that in each of the said cases a certificate shall be first obtained by the said party of the second part, which certificate must be signed by the said architects, Eckel & Mann, and countersigned by the sureties. *Sixth.* Payments made on work during its progress, on account of the contract or extra work, shall in no case be construed as an acceptance of the work executed; but the contractors shall be liable to all the conditions of the contract, until the work is finished, completed and finally accepted by the architects, Eckel & Mann.

The plaintiff, to show performance, introduced the following statement, to-wit:

"ST. JOSEPH, Mo., January 15, 1888.

"Dr. W. C. Boteler bought of Wm. R. Roy, Contractor and Builder, August 8, 1887:

To contract on flats........................		$3,200.00
To extra on front roof, 6 pieces 2x10–20......................$	2 50	
To 80 feet flooring....	1 75	
To 2½ days' labor, $7.50; nails, 25 cts.	7 75	12 00

To extra on main room, 1 door, lock & frame.......................$	7 00	
To 1 window frame, sash and casing	7 00	
To 72 feet inside base..............	2 88	
To 14 pieces 2x4–16, $2.80; 2 pair door casings, $2.50............	5 30	
To 4 days' work, $3.25, $13.00; nails, 50 cts........................	13 50	
To 24 lbs. window weights.........	32	36 00
To extra work—changing front steps		5 00
To paneling front vestibule, 90 hours work, at 30 cts................$	27 00	
To nails and moulding.............	1 00	
To 200 feet clear poplar lumber, at $3.50........................	7 00	35 00
To 2 closets on back porch, 2 days' work.........................$	6 00	
To 100 feet lumber, at $3.00; locks and hinges....................	4 00	10 00
To 80 feet flooring No. 2 bds, $1.60; 7 feet flooring $1.90, used in wood work....................		3 50
		$3,301 50

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By cash.........................$	2,860 96	
Amount paid for inside blinds......	90 00	
Amount paid for picture moulding	13 75	
Four drain boards left out of house	4 00	
Changing sliding door to folding doors.........................	5 00	
Difference in width of back porch..	3 00	2,976 71
"Balance due........		$324 79"

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The plaintiff then introduced, as a witness, the architect Eckel, who testified that the statement was made and certified, in the form presented, at the request of defendant, at the time the work was completed, or about completed; that the work was done under the direction and to the satisfaction of said architects, in accordance with the contract; that eighty-five per cent. was paid by defendant on the work as it progressed, on estimates made by the architects, and at the final wind up, an estimate, already alluded to, was made of the balance due; that after the house was completed it was inspected by the architect.

The defendant objected to this evidence, on the ground, (1) that the contract provided that in every case, when payment was to be made under the contract, including final payment, a certificate should first be obtained by plaintiff, signed by Eckel & Mann, and countersigned by the sureties; and (2) because the statement offered in evidence, under the hand of said architects, was not the certificate of completion required by said contract, which objections were by the court sustained, and the evidence excluded.

The plaintiff then offered to prove that two papers "B" and "C," offered in evidence, and excluded by the court, related to extra work, etc.; that the defendant refused to pay the balance due on said contract, as shown by the statements of said architects, solely on the ground that there was a charge for extra work which he disputed; that the controversy was referred to arbitrators, to whom defendant stated that the only difference between him and plaintiff was this matter of extra work about the panels in the doors; that the contract work had been completed to his entire satisfaction; that he had no objection to make to plaintiff or his work; if he had a dozen houses to build he wanted plaintiff to build them, as he liked his way of doing business; that he repeatedly stated the same thing to

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other witnesses; never found any fault whatever with the contract work; moved into the house, occupied part of it, and has rented the other part for valuable rental ever since contract was completed. Also, by witness Eckel, that the job was done under the direction and to the satisfaction of said Eckel & Mann, and in accordance with the contract; also offered to prove every other allegation in the petition; that these requirements made in paper "D" referred to this house; that in conversation with plaintiff defendant referred to these as the things he wanted done to complete his house; that the final auditing referred to in "B" is in the paper "A," which defendant requested, and the same was made and certified by them in the manner shown in the account. Defendant objected to the offer because the evidence was not competent or relevant under the petition and contract, which objection the court sustained, and plaintiff duly excepted.

The court, on motion of defendant, instructed the jury to find for the defendant, whereupon plaintiff took a non-suit, with leave to move to set the same aside, which was granted, and thereupon judgment was entered accordingly, and, after an unsuccessful motion to set the same aside, the plaintiff took his appeal therefrom here.

I. The procurement by the plaintiff of the certificate of the architect, required by the contract, was a condition precedent. *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 539; *Dinsmore v. Livingston Co.*, 60 Mo. 244; Lloyd's Law of Building and Buildings, sec. 20. This condition should be pleaded, and its performance alleged and proved. *Dinsmore v. Livingston Co.*, *supra*; *Stout v. St. Louis Tribune Co.*, 52 Mo. 347; *Basye v. Ambrose*, 32 Mo. 484; *Turner v. Miller*, 54 Mo. 535.

The long and well-established rule, that a pleading should be construed most strongly against the pleader,

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has been judiciously abrogated in this state. The substitute for this rule is "that the language of a pleading should be taken in its plain and ordinary meaning, and such an interpretation given as fairly appears to have been intended by the author." *Stillwell v. Hamm*, 97 Mo. 579. Testing the pleading in this case, by this modern rule of interpretation, we must conclude that the conditions precedent are well enough pleaded, and the averment that the plaintiff "has duly kept and performed all the promises, covenants and agreements in said contract, on his part, to the satisfaction and under the direction of said architects," is, we think, a sufficient averment of performance under the statute. R. S., sec. 3551. No special statement of facts showing performance is necessary. The general statement, as in this case, that the party has performed all the conditions of the contract on his part, would seem to be sufficient to meet the requirements of the statute just cited. Had the pleader, in his petition, in this case, set out in *extenso* all the conditions of the contract which were necessary to entitle him to a recovery, he would thereby have greatly simplified the case and rendered it impregnable to assault, upon the grounds that have been urged against it.

II. It is contended by the plaintiff, that the trial court erred in excluding from the consideration of the jury the statement of the architects, which was introduced to show compliance with that part of the contract which required the procurement of the architect's certificate. If this statement was sufficient to meet the requirements of the contract, it was conclusive in favor of the plaintiff's right of recovery, until impeached for fraud. No other proof was necessary to enable him to recover on the contract. His whole case, the contract being admitted, was made by it. The rule that the architect's certificate, in such cases, must comply with the requirements of the contract, otherwise no action

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can be maintained, seems well settled by the authorities. Mr. Lloyd, in his work on building and buildings, section 19, states that no particular form of certificate is required. He states that the following short statement will usually suffice:

"I hereby certify that the work of J. B. has been completed to my entire satisfaction, and in conformity to the specifications and drawings, and in a substantial and efficient manner. I further certify that there is a balance of $ —— due him under said contract.

"A. L., Architect."

Any other words conveying a similar meaning will answer. This writer further remarks that, when the contract provides that the architect's certificate shall be in writing, that a want of such certificate will bar the contractor's claim. In *Wycoff v. Meyers*, 44 N. Y. 144, the certificate read:

"This is to certify that the last payment of eighteen hundred dollars is due W. & W. on your buildings, corner of G. and B. streets, as per contract.

"[Signed] E. W. & SON."

It was claimed that the certificate was not in proper form, because it did not in terms certify that "the work was completely finished." "If there was no other answer to this," said the court, "it would be a sufficient answer that the defendant did not place his objection to pay on this ground." *But the certificate was in substance all the contract required.*" In *Snell v. Herf*, 84 Ill. 225, the contract required that the architect's certificate should be signed by two architects, who were partners, when it was only signed by one. The certificate was presented to the plaintiff, who declined to pay because of the delay in the completion of the job. It was held that inasmuch as plaintiff did not, when the certificate was presented, object to it because signed by only one of the architects, so that the objection might be removed, that it was conclusive. In *Downing v.*

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O'Donnell et al., 92 Ill. 559, the architect's certificate, which is substantially the same as the first of the two already transcribed by us, was held sufficient, the court remarking that "the force and effect of the certificate of the architect must be determined by the contract of the parties." *Barney v. Silas*, 11 N. E. Rep. (Ill.) 206, was where the architect's certificate did not substantially meet the requirements of the contract, and the court held that the production of the certificate, required by the contract, was a condition precedent to the right to the payment of the balance under the contract.

The contract in this case required the certificate should be under the hand of the architects and to show, (1) that the whole job had been completed and accepted by the architects, (2) the final estimate by the architects of the amount due on the contract, and (3) that the work had been performed agreeable to the drawings and specifications, under the direction and to the satisfaction of the architect. It will be observed that the statement is wanting in those essentials which the contract required it should contain. It shows the balance due by plaintiff but nothing more. It was sought to supply the omissions by extrinsic evidence. These conditions were imposed by the terms of the contract. They were fundamental. They were by the agreement of the parties made conditions precedent. Their performance was exacted before the plaintiff was entitled to the contract price of any of the work. This was the law governing the relation of the parties, and made so by the terms of the agreement. The statement was not in substance the certificate required by the contract. The most liberal construction that can be placed upon it cannot make it so. The plaintiff sued on the contract, and before he could recover on it he must show compliance, or an excuse for non-compliance. He has endeavored to show compliance by the production of a

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certificate, which is insufficient under the contract, and therefore upon that theory his action must fail.

III. The plaintiff's further contention is that, even if the production of the architects' certificate was a condition precedent, the defendant could waive it, and that the proof of waiver sustains the allegation of performance. It seems that this construction finds some support in the cases of *Ins. Co. v. Kyle*, 11 Mo. 278; *Okey v. Ins. Co.*, 29 Mo. App. 110; *Travis v. Ins. Co.*, 32 Mo. App. 101. The cases cited by plaintiff, and others which might have been cited, assert the doctrine for which he contends only in insurance cases. Why the rules of pleading and practice should be different in actions in insurance contracts from other actions is quite difficult to understand. The rule invoked by plaintiff seems to have so far been only made applicable to actions arising on insurance policies. Why so limited is nowhere made to appear. However this may all be, the cases cited by plaintiff can have no application to a case of this kind, or, if so, then the same are not in harmony with the last utterance of the supreme court, by which we must be governed in this case. *Lanitz v. King*, 93 Mo. 518; *Nichols, Shepard & Co. v. Larkin*, 79 Mo. 271; *First Nat. Bank v. Hatch*, 78 Mo. 24; *Peer v. Hunch*, 52 Mo. 33; *Mohney v. Reed*, *ante*, p. 99, decided at present term, are cases which assert a contrary view. It is not pretended that the plaintiff has pleaded a waiver by defendant of the performance of any of the conditions precedent. If the plaintiff's offer of evidence tended to show a waiver of a condition precedent of the contract, or an excuse on his part for non-performance, it was inadmissible, and properly rejected, unless the petition had alleged such waiver or excuse for non-performance, of which there is no pretense. In view of the rule as declared in *Lanitz v. King* and *Mohney v. Reed*, and the other cases to the same effect which we have cited, it is quite clear that, under the

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general allegation of performance of all the conditions of a contract, evidence of waiver of performance of such conditions is inadmissible. *Mohney v. Reed*, *supra*.

It is contended further that as the statement which was introduced in evidence was made in that form by the architect to meet the request of defendant, it was for that reason not open to the objection made to it. This may be true; still if it was intended to prove a modification or alteration in the condition of the contract, or a waiver or estoppel, it was indispensably necessary for the plaintiff to have framed his pleading with that view so that an intelligent issue could have been made in that respect, then the proposed evidence would have no doubt been admissible. Under the state of the pleadings, the evidence offered was properly rejected, and the action of the court was unexceptionable. The judgment of the circuit court will be affirmed. All concur.

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JACOB BENSBERG *et al.*, Plaintiffs in Error, v. MARK TURK, Defendant in Error.

Kansas City Court of Appeals, March 31, 1890.

1. **Justices' Courts:** NOTICE OF APPEAL: ATTORNEY AND AGENT. The service of notice of an appeal from a justice's court upon an attorney employed to try the case in the courts of the county by the appellee, a non-resident of the county, is sufficient compliance with the statute. The evidence in this case examined and the party served found to be the agent and attorney of the appellee.

2. **Appellate Practice:** ABSTRACT. Matter not presented in the abstract of the record will not be considered in the appellate court.

Appeal from the Buchanan Circuit Court.—HON. O. M. SPENCER, Judge.

REVERSED AND REMANDED.

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Statement by the court.

Plaintiffs commenced their action against defendant by attachment before a justice of peace in Buchanan county. Judgment was rendered against them by the justice May 25, 1888. On the thirty-first day of May plaintiffs took an appeal from said judgment to the circuit court of Buchanan county. At the January term, 1889, the defendant appeared and filed his motion to affirm the judgment of the justice, for the following reasons: "*First.* Because this is the second term of the circuit court for Buchanan county, Missouri, held since the appeal in the above-entitled cause was taken from the judgment of H. W. BURKE, the justice of the peace before whom this cause was tried, and no notice of such appeal has been served on the defendant and appellee as by the law in such cases provided. *Second.* Because no notice of appeal has been accepted in any way, and such notice of appeal has not been waived, and no appearance has been entered by the defendant and appellee herein."

Defendant also, during said term, filed his motion to quash the return of the service of the sheriff, made on the notice of appeal in said cause, for the following reasons set forth in said motion: "*First.* Because by the affidavits filed herewith, said James H. Ringo is not, and has never been, the agent of said defendant and appellee for any purpose, whatever, in Buchanan county, Missouri, or elsewhere. *Second.* Because that part of said sheriff's return of service of said notice of appeal on the said James H. Ringo, wherein the same recites that the said James H. Ringo is the agent of said defendant and appellee, is untrue and not in accordance with the facts. *Third.* Because the return of a sheriff or other ministerial officer cannot, by such return, make any statement or recital to be the truth, which is not the fact and the truth. *Fourth.* Because if the position of attorney in any cause for a party to

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any suit constitutes such attorney the agent of such party, to the extent that the service of notice of appeal would be authorized and available for such purpose served upon such attorney, the letter of instructions from the defendant and appellee herein to his said attorney, and received by his said attorney, James H. Ringo, long before the notice of appeal in this was served upon him as such attorney, and filed with the affidavit of said attorney herein, renders such purpose null and void in law, and such service of notice of appeal on said attorney, as agent and attorney, is unauthorized and unavailable."

"The affidavit of Ringo, referred to in said motion, is as follows: James H. Ringo, being duly sworn, upon his oath states that in the case of Jacob Bensberg *et al.* v. Mark Turk, now pending in the circuit court for the above county and state, on appeal from the judgment of H. W. BURKE, justice of the peace for Washington township, in said county and state, he was employed by the defendant and appellee as his attorney to look after the trial of said cause in the courts of Buchanan county, and for no other purpose, and that he, the said James H. Ringo, has not been, and is not now, acting as the agent of said Mark Turk, defendant and appellee, for any purpose whatever in Buchanan county, Missouri, or elsewhere. That about between two and three months previous to this date the said Mark Turk, defendant and appellee herein, notified this affiant by letter not to accept service of notice of appeal in said cause, and this affiant has followed said instructions and has not accepted notice of said appeal, and has not waived notice of appeal as attorney for said defendant and appellee, and has not entered appearance for said defendant and appellee in said cause. That the letter above referred to from said Mark Turk, defendant and appellee herein, is hereto attached and made part of this affidavit. That James P. Thomas, one of the

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attorneys for the plaintiffs, asked this affiant, as the attorney for said defendant and appellee, to accept service of notice of appeal, and this affiant informed said James P. Thomas that this affiant had been instructed by his client, Mark Turk, defendant and appellee, not to accept service of notice of appeal in said cause."

The letter attached to said affidavit is as follows:

"CRESTON, June 21, 1888.

"*James H. Ringo, Esquire.*

"DEAR SIR:—In reply to your letter of the eighteenth inst. I can inform you that there is no notice of appeal produced to me and I won't accept any; if they would try to serve them on me I will follow your instructions. I would inform you to do the same, and not accept any. I think the time expires the twenty-fifth of this month and I hope they miss it. In regard to the settlement, I can give you the evidence of my wife any time. Best regards.

"Yours,

"MARK TURK."

Defendant's affidavit accompanying said motion is as follows:

"CRESTON, IOWA, February 2, 1889.

"STATE OF IOWA, }
"Union County, } ss.

"I, Mark Turk, being first duly sworn, on oath depose and say, that I employed James H. Ringo as my attorney, to try the case of Jacob Bensberg *et al.* against me in the courts of Buchanan county, Missouri, and for no other purpose. I have not constituted or appointed him as my agent for any purpose in Buchanan county, Missouri, or elsewhere. I wrote him as my attorney some three months ago not to accept service of notice of appeal in the above case, and I also instructed him not to waive notice of appeal in the case."

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On the hearing of said motion to affirm, plaintiffs read the notice of appeal, which is sufficient in form, and as to which no objection is made. And also read the return of the sheriff indorsed thereon as follows:

"I served the within notice of appeal by delivering a true copy hereof to James H. Ringo, the within-named appellee, Mark Turk, not residing in Buchanan county, Missouri, and not being found therein, and the said James H. Ringo being the agent and attorney of said appellee, Mark Turk, in the within-mentioned case. Done in Buchanan county, Missouri, this tenth day of December, 1888.

"EUGENE H. SPRATT, Sheriff."

Upon consideration of the foregoing, the court sustained defendant's motion to affirm the judgment. Plaintiffs filed a motion for a rehearing, assigning as error the action of the court above stated, which motion was also overruled and they excepted.

Lancaster, Hall & Pike, for the plaintiffs in error.

The return of service made by the sheriff is *prima facie* true (*Boyle v. Tolen*, 8 Mo. App. 93); and, besides, the proof is that Ringo, on whom service was made, was defendant's attorney in the suit, and that defendant was not a resident of the county. Ringo was defendant's agent, within the meaning of the statute. R. S. 1879, sec. 3055; *Fuller v. McClure*, 25 Mo. App. 418.

James H. Ringo, for defendant in error.

On the tenth day of December, 1888, when the plaintiffs in error attempted to serve notice of appeal, section 3055 of Revised Statutes, 1879, prescribing how service of notice of appeal shall be made, was in force. In the revision of 1889, section 3055, Revised Statutes, 1879, was amended so as to allow the notice of appeal to

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be served on the attorney who appeared before the justice. See section 6342, Revised Statutes, 1889, thus legislatively construing that section 3055, Revised Statutes, 1879, did not mean that service of such notice of appeal could be made on the attorney who appeared at the trial before the justice. In this cause the plaintiffs in error attempted to serve notice of appeal by having the sheriff serve a copy on the attorney who appeared for the defendant in error before the justice, and in order to make the service available had the sheriff recite in his return, that "said James H. Ringo being the agent and attorney of said appellee," etc. The motion of defendant in error to quash that part of the sheriff's return supported by affidavits was not passed upon by the court below. Such service of notice of appeal is unauthorized and unavailable for any purpose. *Jordan v. Bowman*, 28 Mo. App. 608. As to the force and effect of a sheriff's return on notice of appeal from justices' courts. *Horton v. Railroad*, 26 Mo. App. 349. There should have been a statement filed with the justice showing that the judgment sued on was duly given, still subsisting, and had not been paid or satisfied.

Ellison, J.—Section 3055, Revised Statutes, 1879, relating to notice of appeal from a justice of the peace, is as follows: "If the appeal be not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing, stating the fact that an appeal has been taken from the judgment therein specified. The notice may be served in like manner as an original writ of summons, or by delivering a copy of the same to the appellee, by any person competent to be sworn as a witness, and when the appellee does not reside in the county, and has no agent in the suit therein within the knowledge of the justice, the

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service may be by leaving a copy of such notice with the justice."

Our opinion is that, when the appellee does not reside in the county where the suit is pending, service of notice of appeal may be had upon his attorney and that such attorney is the agent within the meaning of the foregoing section. In *Fuller v. McClure*, 25 Mo. App. 418, this court decided that, when the appellee *resided in the county*, service on his attorney was not sufficient. In *Jordan v. Bowman*, 28 Mo. App. 608, the St. Louis Court of Appeals decided that service of notice on the attorney was not sufficient. But in that case the appellee resided in the county. The court uses quite general terms in speaking of the right to serve the attorney, but it will be noticed that they are qualified by reference to that portion of the statute quoted by the court which does not cover the part applicable to this case.

The point is made by respondent that the sheriff's return is not evidence of service of the notice. Whether this be true or not, it will be seen by reference to the evidence introduced by respondent, on his motion to quash the return, that service of the notice was made, and the objection is that it was not made on the party required by the statute, *i. e.*, on the agent of the respondent. As before stated, we think an attorney is the agent in the meaning of the statute and the only matter left for decision is whether James H. Ringo was shown to be the attorney. We think he was so shown by the evidence aforesaid, introduced by respondent on the motion to quash. That evidence shows that Ringo was respondent's attorney in the cause, not alone in the magistrate's court, but "in the courts of Buchanan county, Missouri." The whole evidence, including respondent's letter, shows Ringo to have been the attorney after the trial in the justice's court as well as before.

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The suggestion that the judgment should be affirmed for the reason, as is stated by respondent, that the suit is on a judgment rendered against defendant and others, while only defendant is sued, will not be considered, as such matter does not appear in the abstract of the record presented.

The judgment will be reversed and the cause remanded. All concur

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WILLIAM C. BOTELER, Appellant, v. WILLIAM R. ROY, Respondent.

Kansas City Court of Appeals, March 31, 1890.

1. **Practice, Trial:** OBJECTION TO JURY ARRAY. The objection that the prevailing party in an action was a member of the county court that selected the regular panel, from which the jury in the cause was drawn in the trial, should be presented by challenge to the array before trial, and comes too late after the verdict, though the complaining party had no knowledge of the fact till after the verdict, unless it is known that substantial injustice had been done.

2. **Building Contract:** SUBSTANTIAL PERFORMANCE: TRIVIAL DEFECTS: INSTRUCTIONS. In an action by the owner against the contractor for breach of contract for building a house it is *error* to instruct the jury that if defendant had substantially performed his contract according to the plans and specifications that plaintiff could not recover, even though these were trivial defects.

3. ——: ACCEPTANCE: POSSESSION: INSTRUCTION. The fact of the owner's going into possession of the building cannot be taken by the jury as an acceptance of the work as done in compliance with the contract, but may be considered in connection with all the facts and circumstances shown in the case.

4. ——: SPECIFICATIONS: CONSTRUCTION: COMPLETION. The contract required the work to be done "without unnecessary delay as soon as ordered;" the specifications (made a part of the contract) recited: "The building will be completed * * * within three months from the date of the contract." The defendant only contracted to do the carpenter work. *Held*, the contract controlled the specifications and did not require the defendant's work to be finished within three months.

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5. ——— : ARCHITECT'S CERTIFICATE AND EVIDENCE. Though the contract makes the architect's certificate conclusive, in the absence of such certificate, his testimony will not be conclusive, but will be received on the same terms with any other witness of equal knowledge and opportunity.

Appeal from the Buchanan Circuit Court.—HON. O. M. SPENCER, Judge.

REVERSED AND REMANDED.

B. R. Vineyard and *Thomas & Dowe*, for the appellant.

(1) The second instruction asked by appellant asserted correct principles of law as applicable to the facts in this case, and should have been given. The contractor must allow for any damages sustained by reason of his failure to perform his contract. *Lowe v. Sinklear*, 27 Mo. 308; *Lamb v. Brolaski*, 38 Mo. 308; *Yeats v. Ballentine*, 56 Mo. 537. (2) The use and occupation of the building by appellant was not an acceptance thereof. Therefore appellant's eighth instruction should have been given as asked by appellant without modification. *Eberly v. Curtis*, 5 Mo. App. 596; *Haysler v. Owen*, 61 Mo. 274; *Yeats v. Ballentine*, 56 Mo. 538; Lloyd's Law of Building and Buildings [1 Ed.] chap. 4, p. 52, sec. 30. The instruction as asked was not objectionable on the ground that it singled out a particular fact, or was a comment on the evidence. *Chouteau v. Iron Works*, 83 Mo. 73–83. (3) The appellant's ninth instruction should have been given. The specifications provide that the work shall be completed within three months from the date of the contract, and the contractor is as firmly bound by the terms of the specifications as by the covenants of the contract. Lloyd's Law of Building and Buildings [1 Ed.] chap. 8, p. 87, sec. 54.

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(4) Appellant's eighth instruction, as modified and given by the court, was erroneous, and should not have been given. The mere fact that the owner went into possession does not tend to show, and is not admissible for the purpose of showing, that the contractor complied with his contract, and, therefore, should not be considered in determining the question. *Coey v. Lehman*, 79 Ill. 173; *Mitchell v. Land Co.*, 3 Iowa, 209, and authorities cited to point 3; *Miller v. Marks*, 20 Mo. App. 369; *Kaiser v. Ins. Co.*, 7 Mo. App. 579; *Jones v. Jones*, 57 Mo. 138. (5) The owner has a right to require of the contractor a literal performance of the contract, and to recover the damages sustained by reason of any failure to comply with the contract in any particular, however trivial. Hence respondent's tenth instruction was fatally defective, and should not have been given. *Hill v. School Dist.*, 17 Me. 316; *Williams v. Porter*, 51 Mo. 441 and 443; *Eyerman v. Cemetery Ass'n*, 61 Mo. 489 and 491; *Marsh v. Richards*, 29 Mo. 99 and 107; *Glacius v. Black*, 50 N. Y. 153, see also 666; *Heckman v. Pickering*, 81 N. Y. 213 and 214; *Nolan v. Whitney*, 88 N. Y. 648. Damages should be allowed the owner for trivial defects. *Mills v. Weeks*, 21 Ill. 563; *Korf v. Lull*, 70 Ill. 420; *Glacius v. Black*, 67 N. Y. 566; *Johnson v. DePeyster*, 50 N. Y. 666; Lloyd's Law of Building and Buildings [1 Ed.] chap. 4, sec. 26, pp. 35 and 36; *Bridge Co. v. Bridge Co.*, 83 Penn. St. 524; *Smith v. Brady*, 17 N. Y. 173. (6) Although the contract makes the architect's certificate conclusive on the parties, yet, if the contractor fails to procure the certificate, the architect's testimony on the witness stand is entitled to no more weight than that of any other witness of equal credibility, intelligence and means of knowledge. It is not conclusive. *Yeats v. Ballentine*, 56 Mo. 539; *McFadden v. O'Donnell*, 18 Cal. 165; *Oakland Retreat v. Rathbone*, 26 N. W. Rep. 472;

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Dinsmore v. Livingston Co., 60 Mo. 244. (7) The court should have sustained the motion for new trial on the ground that the jury had been selected by one of the respondents (Dougherty). The affidavits filed by appellant were uncontradicted, and must be taken as true. No verdict should be permitted to stand when rendered in favor of a party to the suit when the panel is chosen by such party. *Woods v. Rowan*, 5 Johns. 133: *Cowgill v. Worden*, 2 Blackford, 332; *Munshower v. Patton*, 10 S. & R. Pa. 334.

Jas. C. Davis and *Vinton Pike*, for the respondent.

(1) The specifications were first prepared, and it is stated therein that the work will be completed within three months from date of contract. The specifications and drawings only became a part of the written agreement between the parties for the purposes stated in said agreement. The contract makes reference to them only for the purpose of description—not to limit the time of performance. The time is limited by the contract itself, wherein defendant was required to build "without unnecessary delay as soon as ordered." (2) Defendant cannot, by an action, be required to do more than he contracted to do. He was to satisfy Eckel & Mann, and the proof shows he did. Mr. Eckel so testified, and the record states that he gave some written evidence or testimonial of the fact. *Wycoff v. Meyers*, 44 N. Y. 145. (3) In *Thomas v. Fleury*, 26 N. Y. 33-4, it is said, "The certificate is mere evidence of the substantial fact of performance," but the fact may be established by other evidence. This was held in a case by the contractor to recover balance due him from the owner. *Smith v. Alker*, 102 N. Y. 87.

ELLISON, J.—This action is by the owner against the contractor for breach of contract for building a house. Defendant Roy was the contractor, and the

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other defendants were his sureties for his faithful performance of the contract. There was a judgment for defendant and plaintiff appeals.

I. Defendant Doughtery was a member of the county court which selected the regular panel from which the jury in this cause was drawn in the trial court. Such fact was unknown to plaintiff until after the trial, when he set it up in his motion for a new trial supported by affidavits. This objection to the jury ought to have been presented by challenge to the array before trial. After verdict it is too late to object to the manner in which the jury has been returned, or to the officer who returned it. *Samuels v. State*, 3 Mo. 68; *Vierling v. Stifel*, 15 Mo. App. 125; Thompson and Merriam on Juries. And this is true notwithstanding the complaining party had no knowledge of the fact till after verdict, unless it is shown that substantial injustice has been done. *Ib.*

II. The court instructed the jury that if defendant had *substantially* performed his contract according to the plans and specifications that plaintiff could not recover even though there were trivial defects. This instruction should not have been given. The contractor in a building contract need not literally and precisely perform the contract in order to recover thereon. Slight or trivial defects, imperfections or variations will not bar him of his action on the contract, if he has made an honest endeavor to comply and has substantially done so. But a just allowance for such defects, though they be trivial, must be made to the owner. *Monocacy B. Co. v. Iron Co.*, 83 Pa. St. 517, 524; *Heckman v. Pickering*, 81 N. Y. 213; *Nolan v. Whitney*, 88 N. Y. 648; *Glacius v. Black*, 50 N. Y. 153. A party is entitled to compensation for small or slight injuries as well as those of larger extent. So, while if this was a suit on the contract by defendant against plaintiff, seeking to recover the contract price of the

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work on the building, he would not be required to show a literal and exact performance in order to recover, yet he would, if such defense was made, be compelled to allow for whatever deviation there was from the contract, though it was slight. It follows, therefore, that in a suit by the owner against the contractor for damages in failing to perform his contract, substantial performance will not bar the owner's recovery, if there be trivial defects which may be measured by compensation.

In *Nolan v. Whitney*, *supra*, notwithstanding there was a good-faith substantial compliance with the contract, there were trivial defects in the plastering for which an allowance of two hundred dollars was made. This was held to be proper. In *Johnson v. DePeyster*. 50 N. Y. 666, substantial performance was found, and yet one hundred and fifty dollars was allowed for trivial defects. It may be said of the instruction complained of, as was said by Hough, J., in *Haysler v. Owen*, 61 Mo. 274, that it announces the correct rule in a suit by the contractor against the owner when he, the owner, does not seek to recover any special consequential damages by way of recoupment. But here the owner is seeking by direct action to recover such damages and the fact that they arise from trivial defects will not prevent his recovery.

III. Plaintiff's instruction number 8 was modified by the court so as to read, that, "The fact that plaintiff went into possession of the premises described in the petition cannot be taken by the jury as an acceptance of the work done by defendant, as having been done in compliance with the contract, *but may be considered in connection with all the facts and circumstances shown in the case*," etc. The portion in italics is the modification made by the court, and we think it was properly done. Use and occupation of a building is not an acceptance. *Mohney v. Reed*, *ante*, p. 99, but we

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think it may be considered with other evidence in determining that question. Occupancy and use may be one of the many circumstances in evidence going to show acceptance. *Smith v. Brady* 17 N. Y. 173; *Mitchell v. Land Co.*, 3 Iowa, 209. It is a circumstance not alone sufficient, but which may be connected with other evidence.

IV. In our opinion, the contract, when properly considered, did not require the work to be finished by defendant within three months; but required it to be done "without unnecessary delay as soon as ordered." This latter phrase, which is in the contract proper, under the circumstances of this case, will control the specifications (though they were made a part of the contract) reciting that, "The building will be completed, with all outside work herein specified, within three months from date of contract." Defendant's work as carpenter only had reference to a part of the building; he having no control or concern in the other parts. He could by no act of his control the time of finishing the building. A great part of his work necessarily waited upon other parts of the building and he should only be held to perform his contract without unnecessary delay.

V. The contract in this case makes the architect's certificate conclusive on the parties, but in this case the proper certificate was not given by the architect (see *Roy v. Boteler, ante*, p. 213), and in its absence his testimony as a witness will not be conclusive, but will be received on the same terms with that of any other witness with equal knowledge and opportunity. *Dinsmore v. Livingston Co.*, 60 Mo. 241; *Yeats v. Ballentine*, 56 Mo. 530.

The judgment will be reversed and the cause remanded. All concur.

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ELIZABETH KOCH, Respondent, v. JACOB HEBEL, Administrator, Appellant.

Kansas City Court of Appeals, March 31, 1890.

Appellate Practice: RES ADJUDICATA: SECOND APPEAL. When a case has been decided upon solemn argument and again comes to the appellate court by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision; whatever was passed upon must be regarded as *res adjudicata.*

Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

AFFIRMED.

O. L. Houts and *S. T. White*, for the appellant.

J. P. Orr and *A. B. Logan*, for the respondent.

The former decision of this case is *res judicata* of this case. This is the identical case decided by this court in 32 Mo. App. 103. *Grumley v. Webb*, 48 Mo. 563; *Bank v. Taylor*, 62 Mo. 338; *Chouteau v. Gibson*, 76 Mo. 38; *Forester v. Railroad*, 26 Mo. App. 123; *Baker v. Railroad*, 34 Mo. App., *loc. cit.* 111; *Bevis v. Railroad*, 30 Mo. App., *loc. cit.* 566.

SMITH, P. J.—This case was here on a former occasions and will be found reported in 32 Mo. App. 103. The evidence disclosed by the record there is substantially the same as in the present case. And so are all the instructions, except that in the present case the jury were instructed further that, if it should find for the plaintiff, it should allow her such a sum as it should believe the lot mentioned in the evidence was reasonably worth at the time of the death of defendant's intestate,

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not to exceed one thousand dollars with interest thereon at the rate of six per cent. per annum from the commencement of the suit; and that the affidavit of the plaintiff annexed to her account should not be considered as evidence. No objection has been suggested to these instructions. They seem to have been given to meet the views expressed by us when the case was here the first time. No specific objection is pointed out; the other instructions given, which, as has already been stated, have been approved by us, whether these instructions were correct declarations of law as applicable to the evidence, is not now an open question, since the circuit court at the second trial proceeded in accordance with the theories they announced. The rule is that, when a case has been decided upon solemn argument and again comes to such court by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision; whatever was passed upon must be regarded as *res adjudicata*. *Hombs v. Corbin*, 34 Mo. App. 393.

As we held when the case was here before that there was evidence adduced sufficient to justify the court in submitting the case to the jury for their determination, so we must hold now. And we do not feel at liberty in this case to review the question again as to whether or not the performance of family duties should be placed in the category with labor done as gratuitous kindness. As a rule of law in this particular case, under the circumstances already indicated, it is unassailable. No question has been suggested which was not passed upon when the case was first here, and, therefore, our action must be limited to affirming the judgment of the circuit court, in which all concur.

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W. B. TEASDALE, Assignee MASTIN BANK, Appellant, v. O. A. JONES *et al.*, Respondents.

Kansas City Court of Appeals, March 31, 1890.

1. **Injunction:** DAMAGES: BOND: PLAINTIFF'S LIABILITY. On the dissolution of a temporary injunction, damages sustained by reason of the granting thereof should be assessed against the plaintiff, and this, too, notwithstanding the plaintiff did not sign the bond made and accepted under the statutes at the time of the granting such injunction.

2. ——— : WHAT DAMAGES ARE ASSESSABLE. On motion to assess damages on dissolution, only such damages are assessable as resulted from the issuing of the temporary injunction and to the dissolution thereof; and costs and expenses thereafter, though on appeal, have no place in the judgment on such motion.

Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED AND REMANDED (*with directions*).

Johnson & Lucas and *T. A. Frank Jones*, for the appellant.

(1) Under the motion to assess damages in this case no judgment for damages could properly be given against any one, because it does not allege there was an injunction bond. Under the injunction bond in this case no judgment for damages could properly be given against the plaintiff, because neither the plaintiff nor his predecessor, as assignee, was a party to the injunction bond. The liability for damages caused by an injunction is a contract liability, and grows out of the injunction bond. *Keber v. Bank*, 4 Mo. App. 195; *Bank v. Bank*, 4 Mo. App. 505; *St. Louis v. Gaslight Co.*, 82 Mo. 349. (2) Evidence of attorneys' fees and

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other expenses and damages incurred after the dissolution of the injunction in the lower court was improperly admitted. High on Injunctions [2 Ed.] secs. 1431, 1536, 1636, 1665. (3) The plaintiff objects generally to the judgment given in this case because it appears upon the face that it was constructed upon the erroneous theory of assessing the damages, and of dividing them arbitrarily between the plaintiff in this case and the plaintiff in another case, which is set out in the two preceding sections.

J. D. Shewalter and *Graves & Aull*, for the respondent Jones.

(1) The record in this cause shows that an injunction bond was given and filed at the time the injunction was granted. This bond was at the trial offered and read in evidence, and without objection on the part of appellant. Judgment was taken against appellant and not against the securities on the bond, in accordance with the decision and direction of this court in this cause on the former appeal. *Grant v. Crockell*, 9 At. Rep. (N. J.) 201; *Noland v. Johns*, 27 Mo. App. 508; *Coates v. Elliott*, 27 Mo. App. 510. (2) We are at a loss to understand by what stretch of the imagination appellant arrived at the attorneys' fees assessed in this cause. These attorneys' fees were properly allowed. *Bohan v. Casey*, 5 Mo. App. 101; *Buford v. Packet Co.*, 69 Mo. 611; *Holthaus v. Hart*, 9 Mo. App. 1; *Hale v. Megan*, 39 Mo. 272; *Kennedy v. Hammond*, 16 Mo. 341. (3) There was not a syllable of evidence in this cause in regard to any attorneys' fees or other expenses or damages incurred after the dissolution of the injunction. The injunction was dissolved in the lower court, but Coates, assignee, appealed the cause to this court, where the injunction was finally dissolved. Plaintiff is liable for expenses incurred in dissolving

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the injunction. This includes both courts where the judgment dissolving the injunction is appealed from.

GILL, J.—In March, 1884, the respondent Jones owned and held a note for $1,892.50, then past due, and signed by one Reed. Jones also held, as a security for said note, a deed of trust on some real estate in Higginsville, Missouri, as also a chattel mortgage on some livery stock in the town of Higginsville. There were prior incumbrances held by another party on both the real and personal propery. Default being made in payment of Jones' note, he was proceeding to sell this real estate and personal property, subject to the prior liens, and for that purpose had advertised a public sale, when on March 29, 1884, Coates, the former assignee of the Mastin Bank, and plaintiff's predecessor, and Nolan, Reed's administrator, brought two separate injunction suits, the one seeking to enjoin the sale of the real estate and the other to prevent the sale of the livery stock. To secure a temporary injunction, Coates presented a bond made by John J. Mastin "as principal for the plaintiff" and D. C. Mastin as security, and which was approved, and the interlocutory order enjoining defendant Jones was issued. Nolan likewise secured bond and the two cases, it seems, involving the same issues, were ultimately tried in the Johnson circuit court, where defendant Jones was successful, and the two injunctions dissolved. Thereupon both cases were appealed to this court and were affirmed, in so far as the dissolution of the injunctions was concerned, but reversed and remanded on the matter of assessing and entering up judgments for damages against the securities in the injunction bonds. 27 Mo. App. 502–510. Before this cause was again reached in the circuit court Assignee Coates died, and Teasdale, his successor, was substituted in the action.

Acting upon the suggestion of this court, when the cause was heretofore heard, defendant Jones sought to

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have his damages first assessed against the plaintiff, Mastin Bank, and with that view in the circuit court filed an amended motion to assess damages. Upon a hearing the lower court found the damages suffered by defendant Jones on account of the injunction to be $1,985.80, and gave judgment against the plaintiff as assignee for that amount. From this judgment the plaintiff has appealed.

I. We can see no legal objection, whatever, to the revival of this cause as against Teasdale, assignee and successor of Coates, and shall, therefore, first address ourselves to point 4 in plaintiff's brief, the first substantial question raised in this record.

It is contended, in the words of counsel, that "under the injunction bond in this case no judgment for damages can properly be given against the plaintiff, because neither the plaintiff, nor his predecessor, as assignee, was a party to the injunction bond." In the early history of equity jurisprudence temporary injunctions were often issued by the chancellor simply on the *ex parte* showing made by the plaintiff and without requiring any bond or other security; and, if on a final hearing, it transpired that the injunction was without just cause, and was, therefore, dissolved, the party enjoined could not recover damages occasioned thereby, unless it was shown that the injunction was sued out through malice and want of probable cause. In other words, the only relief for injury, however grievous or oppressive, the defendant had on defeating a wrongful writ of injunction, was an action, as in other cases, for malicious prosecution. And to sustain this, of course, it was necessary to allege, and prove, that the injunction was sued out through malice and want of probable cause. The frequent injustice and great, but irreparable, damage thus following hasty and ill-advised injunctions encouraged the equity courts to require, in their discretion, the plaintiff, when asking this extraordinary writ, to

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put up some pledge or security (money, bonds or other valuables), to answer for such damages as may be done the defendant, in case, on final hearing, it be determined that there were no grounds for such injunction. It is in the line of this very just course that we have a statute, requiring a bond from the plaintiff in the cases where a temporary injunction is asked for. Section 5498, Revised Statutes, 1879, contains this provision, and, as amended by the act of 1883, it reads as follows: "No injunction, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties, to the other party, in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined and all damages that may be occasioned by such injunction to the parties enjoined or to any party interested in the subject-matter of the controversy, conditioned that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him, if the injunction shall be dissolved." Section 5500, Revised Statutes, 1889, provides that "*upon the dissolution* of an injunction —— damages shall be assessed," etc.

Now we have here, in the history of this case, a temporary injunction granted, prohibiting defendant Jones from foreclosing his deed of trust, and this interlocutory order was issued only after plaintiff had furnished the bond—not a bond, it is true, signed by the *plaintiff*, but, in the words of the statute, executed by a "*responsible person for him*" (the said plaintiff) with security satisfactory to the court issuing the injunction. The condition of this bond so given by a "*responsible person*" for the plaintiff, is this, to-wit:

"Now if said plaintiff shall abide the decision which shall be made thereon, and pay all sums of money,

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damages and costs that shall be adjudged against *him* (the plaintiff) if the injunction shall be dissolved, then this obligation is to be void, otherwise to remain in full force.

"[Signed] JOHN J. MASTIN, (Seal.)
"DAVID C. MASTIN. (Seal.)"

At the final hearing in the circuit court this injunction was dissolved, and at the time the court proceeded, on motion, to assess the damages and render judgment therefor against the sureties on the bond. These sureties appealing to this court, we held (27 Mo. App. 510) that such a judgment against the sureties was premature—that by the terms of their bond they were only liable for the *default* of the plaintiff in failing to pay the damages which might be assessed against him. The cause was remanded and now we have a judgment against plaintiff alone for the damages secured by the bond, and plaintiff contends that no such judgment can be rendered as he (nor his predecessors) was not an obligor in such bond. To adopt this contention leads to this anomalous and absurd result, to-wit: That there is no indemnity whatever here provided for this wronged defendant. He has already been advised (and correctly, too) that he cannot recover his damages from the *sureties* until he had exhausted his remedy—procured a fruitless judgment for damages against the plaintiff—and now we are asked to say that he *cannot get a judgment against the plaintiff*. Under the conditions of this bond these sureties are only liable for such damages as may be *adjudged against the plaintiff*, and if no damages can be awarded against *him* then such a bond is entirely worthless, although it is *just the bond* directed by the statute—contains the statutory conditions in the very words of the statute; and though the plaintiff (or his predecessor) is not a nominal maker, yet said bond is executed, as the statute says it may be, by "some responsible person for said plaintiff."

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We cannot, therefore, subscribe to the position of plaintiff's counsel, leading as it does to the practical nullification of this very just statute for the protection of the rights of defendants in injunction suits. The cases of *Keber v. Mercantile Bank*, 4 Mo. App. 195 and *St. Louis v. St. Louis Gas Co.*, 82 Mo, 349, do not sustain plaintiff's position, nor conflict with our holding here. In the *Keber case* there was an action for damages (on the case at common law) brought by Keber against the bank for a wrongful injunction, and the court held that in such case he should have alleged and proved that such an action was prosecuted through malice and without probable cause. And in the *St. Louis Gas case* there was no bond given at the institution of the suit, and hence no temporary injunction applied for or granted. In neither of these cases is it held, as contended for here, that the defendant cannot have damages assessed against the unsuccessful plaintiff where he has voluntarily entered into a bond (or secured another to do so for him) to cover such damages.

It comports with rule 5 and practice in equity courts, even in the absence of statutes requiring security, to demand valuables of some kind to secure the defendant; and in such cases, if the injunction be dissolved, the damages would be assessed by the court, and then such security condemned to the satisfaction of a judgment for such damages. *Palmer v. Foley*, 71 N. Y. 108; *Sturgis v. Knapp*, 33 Vt. 520, 521; *Russell v. Farley*, 105 U. S. 445; *St. Louis v. Gas Co.*, 82 Mo. 354. We decide, then, that the damages here complained of are properly assessable against the plaintiff assignee.

II. What damages now, or, rather, what losses or expenses, are to be considered in this summary proceeding against plaintiff? It will not be disputed that only such will be charged up against the plaintiff in this proceeding as are assumed by the giving of the bond for securing the same. The statute contemplates an assessment of only such damages as result from the issuing of

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the temporary injunction and to the *dissolution of* the injunction order. Indeed, it has been held in this state that the motion to assess the damages must be filed in the court at the same term in which the final judgment dissolving the injunction is entered. It seems to have been the theory of the circuit judge (and which is expressly in his brief avowed by defendant Jones' counsel) that, as plaintiff appealed the decision and judgment of the circuit court dissolving the injunction, and gave an appeal bond, such appeal had the effect to revive the injunction order, and continue it in force till a final hearing in the court of appeals. In this, court and counsel are clearly in error. "Neither an injunction, nor a *decree dissolving an injunction*, is reversed or nullified by an appeal or writ of error." *Leonard v. Ozark*, 115 U. S. 465; *State ex rel. Busch v. Dillon*, 96 Mo. 56, and authorities cited on page 62; *Garrow v. Carpenter*, 4 Stewart & Porter, 336; *Hoyt v. Gelston*, 13 Johns. 139; *Town of Guilford v. Cornell*, 4 Abb. Pr. 223; 2 High on Inj., secs. 1536, 1636 and 1665. Any element of damage, then, coming from the costs or expenses of the injunction suit, *after* the final judgment in the circuit court, has no place in the judgment on this motion.

We find, upon an investigation of the testimony, that we can satisfactorily separate these illegal items of charge from those to which defendant Jones is entitled, and shall do so, and direct the lower court as to what the judgment should be, and thereby put an end to this protracted litigation. In our opinion, the theory of division of the aggregate damages between the two injunction suits, as adopted by the circuit court, was fair and just, and, after deducting the illegal charges, as above alluded to, we find that the judgment of the circuit court should have been for the defendant Jones in the sum of $1,865.40, instead of $1,985.80.

We, therefore, reverse the judgment of the circuit court, and remand the cause with directions that the

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court below enter judgment for defendant, O. A. Jones, in a sum equal to the aggregate made up by computing six per cent. per annum interest on $1,865.40 from the date of the original judgment below (which was the thirteenth day of February, 1889) and adding said interest to said sum of $1,865.40. The costs of this appeal are adjudged against defendant Jones—all other costs to be taxed against plaintiff. The other judges concur.

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ELI BEILER, Respondent, v. W. F. DEVOLL, Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Landlord and Tenant:** VERBAL LEASE: STATUTE OF FRAUDS: UNLAWFUL DETAINER. A verbal lease of land entered into, August, 1888, by which the term was to begin in March, 1889, and end March 1, 1890, is within the prohibitions of the statute of frauds, and is no bar to an action of unlawful detainer.

2. ——— : SERVICE OF NOTICE TO QUIT. The service of notice to quit upon the wife of the tenant is sufficient.

3. **Appellate Practice:** IRREGULAR VERDICT FOR THE RIGHT PARTY NOT DISTURBED. A verdict for the right party and not excessive, though irregular, will not be reversed.

Appeal from the Cass Circuit Court.—HON. CHAS. W. SLOAN, Judge.

AFFIRMED.

Bailey & Burney and *Geo. Bird*, for the appellant.

(1) Under the law and evidence in this case defendant was clearly a tenant from year to year, even if there had been no express permission to hold over, and was entitled to three months' notice in writing to

quit, and the court below sustained defendant's objection to plaintiff's attempt to prove said notice, and should have sustained defendant's demurrer to plaintiff's evidence. Without said notice plaintiff cannot recover. R. S. 1879, sec. 3077; R. S. 1879, sec. 2509; *Hammond v. Douglass*, 50 Mo. 434; *Wilgus v. Lewis*, 8 Mo. App. 336. (2) The lease for 1886 and 1887 was written, and after the termination of said lease defendant was, by the permission of the plaintiff, allowed to remain in possession of the farm for the year 1888, plaintiff receiving the rent for that year. Defendant, therefore, became a tenant from year to year. *Finney v. St. Louis*, 39 Mo. 177; *Quinette v. Carpenter*, 38 Mo. 502; *Bircher v. Parker*, 40 Mo. 118; *Withnell v. Petzold*, 17 Mo. App. 673, and cases cited; *Grant v. White*, 42 Mo. 289. (3) The court below at first refused to allow defendant to prove the verbal permission given by plaintiff August 10, 1888, to defendant to remain on the farm during the year 1889, but afterwards concluded this ruling was error, and allowed defendant to prove said verbal permission. We submit that on this theory of the case the court erred in instructing the jury to find for plaintiff. (4) Where the statute requires notice without prescribing the method of service, personal notice in writing must be given by a delivery thereof directly to the person to be notified. *Ryan v. Kelly*, 9 Mo. App. 396; *Heller v. Leisse*, 13 Mo. App. 183. (5) We submit that the verdict in this case is improper, the first verdict being for plaintiff for one hundred and forty dollars, and allowing defendant to retain possession of the farm until March 1, 1890. The rental value of the land was proven for the whole year and plaintiff's attorney, after the jury had returned with its verdict, and without defendant or his attorney being present, divided the one hundred and forty dollars by twelve and then multiplied by the number of months from the first of March

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until the day of the trial, and inserted the results in the blanks in the form of verdict given by the court, besides giving his client possession of the land, thereby taking the very thing out of the hands of the jury that they were sworn to try.

Noah M. Givan, for the respondent.

(1) The parol contract made August 10, 1888, by which defendant claims to have leased the land until March 1, 1890, and by which he justified his possession, was, if made, invalid. R. S. 1879, 2513; *Briar v. Robertson*, 19 Mo. App. 66; *Delano v. Montague*, 4 Cush. 44; *Sharp v. Rhiel*, 55 Mo. 97; *Self v. Cordell*, 45 Mo. 345; *Atwood v. Fox*, 30 Mo. 499; *Hoyle v. Rush*, 14 Mo. App. 408. (2) Even if the tenancy in question was from year to year, notice to quit on March 1, 1889, had been given more than three months before that date, and the delivery of such notice to defendant's wife at his home on the premises, in his absence, was a good service of such notice, and the contents of the notice in its absence may be proven by parol. 2 Greenl. on Ev., secs. 322 and 324; Wade's Law of Notice, sec. 640; R. S. 1879, 2458 and 3077; *De Giverville v. Stolle*, 9 Mo. App. 187; *Morgan v. Railroad*, 76 Mo. 169; *De Witt v. Smith*, 63 Mo. 263; *Strauss v. Ayers*, 34 Mo. App. 248. (3) The court properly instructed the jury to find for plaintiff, and it was its duty to give the jury the statutory form of verdict, and properly permitted the verdict to be amended in open court. R. S. 1879, 2436; *Falconer v. Roberts*, 88 Mo. 580; *Morgan v. Durfee*, 69 Mo. 476; *State ex rel. v. Marshall*, 4 Mo. App. 34; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Powell v. Railroad*, 76 Mo. 80; *Commissioners v. Clark*, 94 U. S. 284.

Smith, P. J.—This was an action for unlawful detainer. The evidence of the plaintiff tended to show that the plaintiff, by an agreement in writing, rented

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the defendant one hundred and sixty acres of land, for the years of 1886 and 1887, each year ending March 1; that the plaintiff made a verbal lease, to defendant, of the same land for the year 1888, expiring March 1, 1889; that plaintiff, more than three months preceding the expiration of said verbal lease, caused a notice to be served on the defendant to deliver the possession of the premises at the expiration of his lease. The service of notice was on defendant's wife. The evidence of the defendant tended to show that, in August, 1888, the plaintiff verbally rented him, for the year 1889, twenty-five acres for wheat, thirty acres for oats and thirty acres for corn, the same being part of the one hundred and sixty acres which he had leased the three preceding years; that nothing was said in the verbal agreement, for the letting of said land to defendant, for the year 1888, when the next year should end. This suit was begun on the twenty-fourth of April, 1889, after the defendant had planted his corn and oats, the wheat having been sown during the preceding autumn. There was some other evidence which it is unnecessary to refer to here. The trial court instructed the jury that, under the pleading and evidence, the plaintiff was entitled to recover. The judgment being for plaintiff, defendant appealed.

I. The verbal lease of the land entered into, August 10, 1888, by which defendant's last term was to begin in March, 1889, and end in March 1, 1890, was within the prohibitions of the statute of frauds. R. S. 1879, sec. 2513; *Briar v. Robertson*, 19 Mo. App. 66; *Delano v. Montague*, 4 Cush. 44; Browne on Statutes of Frauds, sec. 272. The defendant, therefore, was precluded from interposing the said verbal lease, as a defense, in bar of the plaintiff's right of recovery of the possession of the premises. If the defendant had any right to the possession, it was as tenant from year to year. The uncontradicted evidence was, that the plaintiff gave

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the defendant notice to quit, which notice, if properly served, was sufficient, with the other evidence, to make out for plaintiff a *prima facie* case, entitling him to recover, unless there was countervailing evidence adduced by defendant, which there was not. The instruction given by the court was authorized by the evidence.

II. It seems well settled, that where personal service cannot be effected in the absence of a statute, requiring the service of notice to quit to be made in a specified mode or manner, that it will be sufficient, if left with the wife of the tenant. Taylor's Landlord and Tenant, sec. 484; Wood on Landlord and Tenant, sec. 87. Section 3077, Revised Statutes, is silent as to the manner of the service of the notice therein required, but we think the service on the wife is sufficient under it.

III. There are some irregularities suggested in respect to the verdict. While such practice is not to be approved, still, inasmuch as the verdict seems to be for the right party, and for an amount not in excess of what the plaintiff was entitled to recover, we shall not reverse the judgment on that account. The judgment will be affirmed. All concur.

Effie Harris, by next Friend, Respondent, v. The Missouri Pacific Railway Company, Appellant.

Kansas City Court of Appeals, March 31, 1890.

Negligence: CONTRIBUTORY: DEMURRER TO EVIDENCE. Defendant's railroad had two tracks running east and west—the north one used by west-bound trains—the south one by east-bound trains. Plaintiff's father had prior to his employment by defendant worked near a railroad. He was employed in a gang building a fence on the north side of the two tracks. His part of the work was to carry posts scattered along on the south side of the two

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tracks across them to the north side. He was working about two hundred feet west of a sharp curve which prevented a west-bound train on the north track being seen at a distance greater than that. Defendant was crossing back south after posts when he encountered an east-bound freight train on the south track and he stopped on the north track just inside of the south rail apparently waiting for the freight train to get by and apparently watching its movements only. While at this place and in this position, a passenger train from the east on the north track coming around the curve at a speed of thirty-five or forty miles an hour ran over and killed him. This was the deceased's third day's work at this place during which time trains had been constantly passing and the foreman had cautioned the men to be careful. *Held,*—

(1) That the death of the deceased was directly brought about by his own negligence. (*Distinguishing Gessley v. Railroad,* 82 Mo. App. 413.)

(2) That, though the foreman be regarded as vice-principal and was guilty of negligence in not placing out a watchman, deceased knew of such negligence and continued in the service without complaint.

(3) That it was *error* to overrule a demurrer to plaintiff's evidence.

Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED.

Adams & Buckner, for the appellant.

(1) Where the facts of a case are undisputed, it is a question for the court to determine whether or not the facts proven constitute negligence. *Kelly v. Railroad*, 11 Mo. App. 1; *Yancy v. Railroad*, 93 Mo. 433; *Bell v. Railroad*, 86 Mo. 599; *Zimmerman v. Railroad*, 71 Mo. 476; *Lenix v. Railroad*, 76 Mo. 86; *Moody v. Railroad*, 68 Mo. 470. (2) Where the undisputed evidence shows a clear case of contributory negligence, the duty of the court is to take the case from the jury. *Lenix v. Railroad, supra*, and authorities above cited. (3) The act of deceased in standing upon the north

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track, watching the train on the south track, and his failure to observe the approaching train, and in failing to be in a position where he could have seen it was *per se* an act of gross negligence. *Lenix v. Railroad*, 75 Mo. 86; *Moody v. Railroad*, 68 Mo. 470; *Railroad v. Beale*, 73 Pa. St. 501; *Schofield v. Railroad*, 8 Fed. Rep. 44; *Bell v. Railroad*, 72 Mo. 50. (4) There is no rule or law which required the defendant to provide a watchman to notify the deceased of the approach of trains, even if he had been at work upon the track, which he was not, but, even where a legislative act is violated, a person has no right to shut his eyes and ears and place himself in a position of danger. *Kelley v. Railroad*, 75 Mo. 138. (5) Certainly the duty of defendant to the traveling public is as great as towards its employes, yet it has been held that railroads were not required, in the absence of a statute requiring it, to keep a watchman stationed at a highway crossing "no matter how dangerous." *Welsh v. Railroad*, 72 Mo. 451. (6) In a case where a flagman had been provided at a crossing, and afterwards withdrawn, it was held it did not relax the care on the part of the traveler. *McGrath v. Railroad*, 59 N. Y. 468. And the absence is immaterial if the traveler did not know of the custom to station one at the point in question. *Pa Kalinsky v. Railroad*, 82 N. Y. 424. (7) So in the case at bar no watchman was required to be kept either by law or by rule of the company. None had been kept while deceased was in the employ of the defendant. Knowing these things, it became one of the risks which deceased assumed when he entered the service of defendant. *Hathway v. Railroad*, 51 Mich. 253; *Cogney v. Railroad*, 69 Mo. 416. "If the danger is apparent," or "if the servant with full knowledge of the employer's way of conducting his business engage and co-operate in it, they voluntarily assume the risks." *Railroad v. Smithson*, 45 Miss. 212. (8) The deceased having

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entered the service of defendant with knowledge that no watchman had been provided, or without any promise or inducement to lead him to believe that one would be supplied, respondent cannot recover, if deceased was killed for want of such watchman. *Hayden v. Mfg. Co.*, 29 Conn. 548; *McGlinn v. Brodie*, 31 Cal. 371; *Huddleston v. Machine Shops*, 106 Mass. 282; *Combs v. Cordage Co.*, 102 Mass. 585; *Railroad v. Thomas*, 51 Miss. 637; *Sullivan v. Mfg. Co.*, 113 Mass. 398; *Kroyn v. Railroad*, 32 Iowa, 361; *Muldowney v. Railroad*, 36 Iowa, 465; *Railroad v. Barber*, 5 Ohio St. 541; *Davis v. Railroad*, 20 Mich. 105; *Buzzell v. Laconia Co.*, 48 Me. 113; *Owen v. Railroad*, 1 Lans. 108; *Railroad v. Love*, 10 Ind. 556; *Thayer v. Railroad*, 22 Ind. 30; *Stone v. Mfg. Co.*, 4 Oregon, 52; *Frazier v. Railroad*, 38 Pa. St. 111; *Perry v. Marsh*, 25 Ala. 667; *Jones v. Yeager*, 2 Dill. 67; *Gibson v. Railroad*, 63 N. Y. 449; *Railroad v. Eddy*, 72 Ill. 138; *Railroad v. Britz*, 72 Ill. 257; *Dillon v. Railroad*, 3 Dill, 324; *Ladd v. Railroad*, 119 Mass. 412; Pierce's Am. R. R. Law, p. 297; 1 Add. on Torts [Wood's Ed.] sec. 564; Shearman & Redf. on Neg., sec. 94; *Devitt v. Railroad*, 50 Mo. 305; *Hulett v. Railroad*, 67 Mo. 239; *Dale v. Railroad*, 63 Mo. 455; *Assop v. Yates*, 2 Hurl. & Nor. 768; *Dyner v. Leach*, 26 L. J. 221; s. c., 40 Eng. L. & E. 491; *Senior v. Ward*, 102 Eng. C. L. 385; *Griffiths v. Gidlow*, 3 Hurl. & Nor. 648; *Watling v. Oastler*, Law Rep. 6 Exch. 73; *Patterson v. Wallace*, 28 Eng. L. & E. 48; *Skip v. Railroad*, 24 Eng. L. & E. 396; *Seymore v. Maddox*, 16 Q. B. 316; *Wright v. Railroad*, 25 N. Y. 566; *Buzzell v. Mining Co.*, 43 Me. 113; *Thayer v. Railroad*, 22 Ind. 26; *Hayden v. Mfg. Co.*, 29 Conn. 548; *Railroad v. Barber*, 5 Ohio St. 541.

Geo. W. Harrison and *S. P. Sparks*, for the respondent.

(1) Morrison was a vice-principal, not a fellow servant, of deceased, as to acts which were the result

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of the authority conferred upon him; as he had the power to employ and discharge, to control and direct the men at work. *Railroad v. May*, 108 Ill. 288; s. c., 15 Am. & Eng. R. R. Cases, 320; *Stephens v. Railroad*, 86 Mo. 231, *loc. cit.* 229; *Flynn v. Railroad*, 78 Mo. 195. (*a*) It follows that the negligence of Morrison was the negligence of the railroad company. (*b*) The first instruction given for respondent is an adoption of one approved in *Railroad v. May, supra; Railroad v. Sullivan*, 43 N. W. Rep. 415. (2) At common law the master assumed the duty toward the servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, and, when the service required of an employe is of a peculiarly dangerous character, it is the duty of the master to make reasonable provisions to protect him from the dangers to which he is exposed while engaged in the discharge of his duty. *Railroad v. Fox*, 31 Kan. 587; s. c., 15 Am. & Eng. R. R. Cases, 325; *Gessley v. Railroad*, 32 Mo. App. 413; 1 Thomp. Neg. 461; *Railroad v. Fox*, 21 Pac. Rep. 797. (*a*) The second instruction, given at the instance of respondent, was an adaption of an instruction approved by this court, in *Gessley v. Railroad, supra.* (3) In the circumstances of this case it was the duty of the defendant's vice-principal Morrison to have taken the precautions to have watched or to have set some one to watch for the approach of trains, and deceased had the right to become engrossed in the work on the track and oblivious to the approach of trains, and it was negligence in Morrison to leave them in such great peril. *Gessley v. Railroad*, 32 Mo. App. 413; *Erickson v. Railroad*, 43 N. W. Rep. 332; 1 Thomp. Neg., p. 461. (4) Harris and Magers were surprised by great danger, were placed in imminent peril by the fault of defendant, and it could not be expected of them to choose with promptness the safest method of escaping such dangers, and the ordinary rules

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of contributory negligence are not applicable to them. *Adams v. Railroad*, 74 Mo. 553; 1 Thomp. Neg., p. 462. See leading article entitled "Negligence in Imminent Peril," 25 Am. Law Reg. 617, where all the cases are collected and the doctrine correctly stated by Wm. Colebrook, Esq. (5) It was not incumbent on plaintiff, thus showing the negligence of Morrison in putting deceased to work in a dangerous place without taking the ordinary precautions against such danger, to go further, and show that deceased was free from negligence. *Buesching v. Gaslight Co.*, 73 Mo. 219. (6) The law out of regard to the instincts of self-preservation presumes that a person who has suffered death by a railroad accident was, at the time of the accident, in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury. *Flynn v. Railroad*, 78 Mo. 195; *Buesching Case*, *supra.* (7) The *onus* was not on plaintiff to show in the circumstances of the case that deceased was not only injured by the negligence of defendant, but also that deceased himself had not been guilty of contributory negligence. *Swigert v. Railroad*, 70 Mo. 480. (8) The deceased's fault, if any there was, is not disclosed by the evidence, and the company is shown to have been in default. It devolves upon the defendant to show the want of proper care on the part of the person injured, and that by the exercise of proper care he would have escaped the injury. *Stepp v. Railroad*, 94 Mo. 229, *loc. cit.* 230; *O' Conner v. Railroad*, 94 Mo. 150, *loc. cit.* 158. (9) The propositions of law 1 and 2, appellant's brief, are fundamental but have no application to this case. Whether, under all the circumstances of the case, deceased was guilty of contributory negligence, was fairly submitted to the jury. (10) The third proposition of appellant's brief, "that it was *per se* negligence in deceased to be standing (just inside the rail) on north track, looking toward the passing freight train for an instant," is narrowing

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the whole tragedy to a single act of deceased when in imminent peril. It is certain that the whistle was not sounded until the instant they were struck. *Parsons v. Yaeger*, 7 Mo. App. 594.

ELLISON, J.—Plaintiff is the daughter and only child of John Harris, who was killed by defendant's engine and cars on March 10, 1887. He did not leave a widow. The action is founded upon a petition declaring on defendant's negligence in not warning deceased of the approach of the train. The answer was a general denial and contributory negligence. There was a judgment for plaintiff and defendant appeals, assigning among other alleged errors that the court should have sustained the demurrer to the testimony.

The case as made out by plaintiff shows that deceased had lived in Warrensburg, and had, before entering defendant's service, worked in a mill at that place, near defendant's railway tracks, upon which trains were constantly passing. That he entered defendant's service as a day laborer, two days before the accident. That he was set to work at fence-building with a gang of fence-builders between Independence and Kansas City. The "gang" being in charge and under the orders of a foreman. Between Independence and Kansas City defendant has a double track running east and west. At the place where the work was going on there is a sharp curve, which prevents a train coming from the east towards Kansas City from being seen by a person on the track at a greater distance than two hundred feet. This was the least distance put by plaintiff's witnesses. There were posts lying scattered on the south side of the tracks, which were being used in building a fence on the line of the right of way north of the north track; that is, the posts on the south side of the tracks were being used in the construction of the fence on the north side of the track. Deceased, with a companion, was engaged in carrying

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these posts across the two tracks, and, while he and his companion were returning to the south side for more posts, a freight train of twenty or more cars was passing east, at the rate of ten or twelve miles an hour, on the south track; the south track being used by east-bound trains and the north track by west-bound trains. They stopped on the north track, just inside of the south rail, apparently waiting for the freight train to get by, and apparently observing its movements only. While at this place and in this position, a passenger train from the east, on the north track, coming around the curve at a speed of thirty-five or forty miles an hour ran over and killed both deceased and his companion. Deceased began work at this place on the evening of the eighth and worked that evening, all of the ninth and up to eleven o'clock the morning of the tenth, the hour of his death. During this time trains were constantly passing each way; besides regular trains, there was an accommodation between the two cities. The foreman had cautioned the men to be careful, though one of them testified he did not hear it. Deceased knew there was no one placed as a watchman to give warning of an approaching train.

It is quite evident from this recital of the showing made by plaintiff that the death of deceased was directly brought about by his own negligence. While it does not appear that he was carrying posts during all of the time he was working at the place of the accident, yet he was during the whole period working on the right of way where he could observe the trains as they passed in either direction. He knew that trains were passing at frequent intervals; that on the south track they passed east and on the north track they passed west; that on the north track they would come around a curve a short distance from where he was working. Yet with this knowledge he stopped on the north track in such a position, either that he could not see in the

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direction that trains would come, or allowed himself to become so absorbed in watching the passing freight train as to be oblivious to other matters. He was evidently not on the lookout for his safety, for he could easily have saved himself by clearing the track. Though allowing that he could not have seen the train more than two hundred feet away, and that it was approaching him at the rate of forty miles an hour, he would have had ample time to have escaped collision; a single step would have been sufficient. It must be borne in mind that there is no question made here as to negligence on the part of those in charge of the train. The whole negligence charged in the petition is upon the foreman of the fence laborers, and to such negligence plaintiff must be confined. *Ellis v. Railroad*, 17 Mo. App. 126, and cases cited.

We are, however, cited to the case of *Gessley v. Railroad*, 32 Mo. App. 413, where it was decided by this court in an opinion by HALL, J., that persons who are lawfully upon a railway track engaged in labor "have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains, relying, as they may, upon the duty imposed by law with reference to them" upon the railway company of active vigilance for their safety. That case is not applicable to this. The facts are unlike. Here deceased was not engrossed in his work. The most favorable thing that can be said of him is that he was waiting for the freight train to pass by, that he might proceed on after posts. But in thus waiting it was not necessary for him to stop on the north track, or, if he did, it was gross carelessness in him to so place himself that he could not see a train coming on the north track, knowing, as he must have known (this being his third day's work at the place), of the frequency of trains from the one direction.

It is one of plaintiff's principal contentions that it was the foreman's duty to have warned him of the

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approach of the train. Whether such warning should have been given by telling him that a train would pass at that time, or by placing a watchman to warn him, is not stated. If the former, it may well be answered that deceased had full knowledge of the great number of trains passing in one direction on this track, and it would have been idle to tell him, under these circumstances, of any particular train, especially in the light of the warning he had to be careful. If it is meant to contend that the foreman should have placed a watchman on the lookout, we may concede for present purposes (though not so deciding) that it was his duty to do so, yet deceased knew he had not performed that duty. He knew that there was no one upon whom he could rely to warn him, and with this knowledge he voluntarily put himself in the dangerous position.

It is familiar law that the master must furnish the servant with safe machinery with which to work, yet if he has not done so and the servant has knowledge of the defect and of its dangerous tendency, and yet voluntarily continues in the use of such machinery, he cannot recover damages for an injury resulting from such defect. *Devitt v. Railroad*, 50 Mo. 305; *Hulett v. Railroad*, 67 Mo. 239. This proposition is alike applicable to one who voluntarily continues, without objection, in the employment of the master with a knowledge of the dangerous or incompetent character of a fellow servant. *McDermott v. Railroad*, 87 Mo. 285. It is alike applicable to one who takes employment and engages to do service under another who bears the relation of vice-principal to the master. *McDermott v. Railroad, supra.* So, notwithstanding that deceased and the foreman were not fellow servants (*Moore v. Railroad*, 85 Mo. 588), yet deceased knowing of the foreman's negligence in not providing a watchman continued in the service without complaint. In doing so he *took upon himself* the risk of injury *resulting from*

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such negligence. See authorities collected by defendant's counsel. The *McDermott case, supra,* deals directly with this question and the justness of the rule could not well be better or more clearly demonstrated than is done by Judge HENRY in that case.

Our opinion, therefore, is, that under the evidence plaintiff is clearly not entitled to recover. This disposition makes it unnecessary to discuss other points presented. The judgment will be reversed. All concur.

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JAMES THORNTON *et al.*, Trustees of the ZOAR BAPTIST CHURCH, Respondents, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, March 31, 1890.

1. **Appellate Practice:** OBJECTION TO EVIDENCE. Objections to the admissions of evidence cannot be made for the first time in the appellate court.

2. **Instruction:** POSSESSION: INDEFINITE DESCRIPTION: INTENTION OF GRANTOR. In a contest between two grantees of the same grantor, where the older conveyance was indefinite in its description of the premises intended to be conveyed, it is not error to admit parol evidence as to the intention of the grantor to convey to the older grantee the land claimed to be embraced in the conveyance to the subsequent grantee, and to instruct the jury that if the grantors in the former conveyance intended and understood they were conveying the premises in dispute to the grantees therein, and that said grantees, believing said deed, conveyed said premises to them, and, under and by virtue thereof, took possession of said premises, and have ever since that time—more than ten years—held possession thereof, and now have possession of the same, then said former grantees are entitled to recover, etc.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

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Statement by the court.

This is an action, brought by the trustees of the Zoar Baptist church, at Napton, to recover damages for the alleged taking of a small corner of a lot of ground, alleged to belong to the church, by the defendant railway company, and for the inconvenience resulting to the congregation from the operation of its trains on its road. It is claimed by plaintiff that the corner of their lot ran up to the edge of the public road. In 1867, Philip Leininger and others conveyed, out of a larger tract, to which they had the legal title, to the said church "three-fourths of an acre of land, within and surrounding said Baptist church, in the town of Jonesboro, * * * said land to extend to the present county road, west of said church, * * * so long as said property, hereby conveyed, shall be used for church purposes."

The said Leininger owned the property on the south and west of the road. It further appeared that since the deed was made the road had been changed twice, once by the railroad. There was no evidence as to the extent of such change, or the distance from the original location. The railroad was constructed in front of the church, across a public road, by permission of the county court, and it is contended that from the corner of the lot, as fixed by plaintiffs' witnesses, to the center of the track is twenty-five feet. It further appeared in evidence that only a portion of the three-fourths of an acre conveyed to the church was inclosed, and that the corner alleged to have been taken was off that portion which was uninclosed, and was used for hitching horses, and as a means of ingress and egress by the original grantees to their premises. The same grantors conveyed to the railroad company the right of way through their land, and it was in evidence that the defendant's engineer had no information as to any claim that the church had upon the corner taken, and that the trustees of the church,

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although they knew the road was being constructed and were there, made no claim to the corner in controversy, and that he supposed the land was covered by the deed to the company.

Adams & Buckner, for the appellant.

(1) The court erred in admitting evidence as to anticipated damages, caused by the noise made by trains passing the church, frightening horses, etc., such inconvenience is no ground for damages. *Beisman v. Railroad*, 50 N. J. L. (21 Vroom.) 235; *Patten v. Railroad*, 33 Pa. St. 426; *Moses v. Railroad*, 21 Ill. 522; *Railroad v. Lazan*, 28 Pa. St. 203; *Stone v. Railroad*, 68 Ill. 394. (2) Philip Leininger conveyed to defendant railway company a right of way, one hundred feet wide, through his land, for the consideration of two hundred dollars. He had previously granted three-quarters of an acre "within and surrounding said church." As between these parties, the court erred in permitting parol evidence, as to the intention of the grantor to convey to the church the land which is embraced in the right of way. *Bailey v. White*, 41 N. H. 337, 344; *Child v. Well*, 13 Pick, 121; *McCoy v. Galloway*, 3 Ohio, 283; *Emery v. Kohlen*, 29 Barb. 169; *Parker v. Kane*, 22 How. [U. S.] 1-18; *Clark v. Baird*, 5 Seld. 183; *Dodge v. Nichols*, 5 Allen, 584; *Peaslee v. Gee*, 19 N. H. 278; *Dean v. Erskine*, 18 N. H. 83; *McGuire v. Tyler*, 8 Wall. 660; *Danterior v. U. S.*, 11 Otto, 707; *Woodford v. McKinney*, 23 Tex. 45. Under these authorities, the court erred in giving to the jury respondents' fourth instruction and refusing instruction numbered four, prayed by appellant.

Scott & Cooney, for the respondents.

(1) As to the first point made by the defendant: The evidence complained of was brought out wholly by the defendant in his cross-examination of plaintiffs' witnesses; he made no objections to the evidence on

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the trial of the case, either general or specific, and "it hardly lies in the mouth of the defendant to object here to" an error, if it be an errror, "which he invited the court to commit." An objection to evidence comes too late when made for the first time in the appellate court. *Loomis v. Railroad*, 17 Mo. App. 340–53; *Davis v. Brown*, 67 Mo. 313; *Faulkner v. Thornton*, 68 Mo. 368–9; *State v. West*, 21 Mo. App. 309. (2) The second point assigned for error by the defendant is an indirect attempt to set up an estoppel, and it is claimed that, as between plaintiff and defendant, the court erred in permitting parol evidence, as to the intention of the grantor to convey to the church the land embraced in the right of way. (*a*) The defendant did not plead estoppel in its answer and no instructions were asked on any such theory. *Miller v. Anderson*, 17 Mo. App. 71; *Bray v. Marshall*, 75 Mo. 327; *Robbins v. Magee*, an Indiana case, decided November 29, 1881, found in 4 Cent. L. J. 129; *Walker v. Owens*, 79 Mo. 563–8; *Boles v. Perry*, 51 Mo. 449; *Spurlock v. Sproule*, 72 Mo. 503; Bigelow on Estoppel [3 Ed.] 503. (*b*) The evidence given on the trial does not show facts sufficient to create an estoppel. (*c*) The court committed no error in permitting parol evidence as to the intention of the grantors, in making their deed to the church, to convey to it the land embraced in the right of way from Leininger. *Sensenderfer v. Kemp*, 83 Mo. 581–9; *Rhodes v. Outcalt*, 48 Mo. 367–70; *Muldrow v. Robinson*, 58 Mo. 331–50; *Maupin v. Emmons*, 47 Mo. 304–6. (*d*) And now as to the evidence itself: The lot being the property of plaintiffs they had the right to show it by any evidence in their possession. They showed title by actual adverse possession for the statutory period. They showed a deed from Leininger, Lewis and Moore to the trustees of the church society, imperfect, it is true, for the want of definiteness of description, but it is a deed between grantor and grantee, and "the law applicable to deeds of this character" is not so strict

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in its requirements of certainty in their description of the lands conveyed, as in sheriff's sales and other proceedings *in invitum.* In the former parol evidence is allowed to explain and identify and locate. *Long v. Higginbotham,* 56 Mo. 245-51; *Mansfield v. Pollack,* 74 Mo. 185-7. (*e*) If the positions taken by the plaintiff in the foregoing be correct, it follows that the court did not err in giving to the jury respondents' instruction, and in refusing instruction numbered four, in the shape it was asked for by the appellant.

Ellison, J.—Defendant assigns but three errors in this court upon which it asks a reversal:

(1) "The court erred in admitting evidence as to anticipated damages, caused by the noise made by trains passing the church, frightening horses, etc. Such inconvenience is no ground for damages."

(2) "The court erred in giving to the jury respondents' fourth instruction, and refusing instruction numbered four, prayed by appellant."

(3) "Philip Leininger conveyed to the defendant railway company a right of way, one hundred feet wide, through his land, for the consideration of two hundred dollars. He had previously granted three-fourths of an acre 'within and surrounding said church.' As between these parties, the court erred in permitting parol evidence, as to the intention of the grantor to convey to the church the land which is embraced in the right of way."

As to the first objection, it is sufficient to say that the evidence was admitted by the trial court without objection from defendant, and it cannot now be heard to complain. Objections of this nature cannot be made for the first time in this court.

As to the second objection, the court gave for plaintiff the following instruction:

"4. Although the jury may believe that the deed offered in evidence by the plaintiff from C. Q. Lewis and others to James Thornton and others, as trustees of

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the United Baptist Church of Zoar, does not definitely and properly describe the premises mentioned in the petition, yet, if they further believe from the evidence, that the said deed was made by the grantors therein named, with the intention and understanding that they were thereby conveying the premises mentioned in the petition to said trustees therein named, for the use and benefit of the said United Baptist Church of Zoar for church purposes, and that said church and its trustees received said deed believing that it conveyed to them said premises, and that under and by virtue of said deed the said church society and its trustees took possession of said premises, and have ever since that time, to-wit, June 18, 1867, held possession of said premises, and now have possession of the same, and have heretofore and now do hold and use said premises for church purposes, and that the church society, mentioned in the petition, is the same church society mentioned in said deed, although with different names, and that plaintiffs are the duly appointed trustees of said church society, then plaintiffs are entitled to recover all damages (if any) done to said church property by reason of defendant's railroad running over or through any part of the same; if said road was run over said property, without condemnation proceedings, and without the consent of the plaintiffs, not exceeding the sum of two thousand dollars."

Under the evidence in the cause there was no error in this instruction. Notwithstanding the indefiniteness of the description in the deed, the testimony showed without contradiction that the church had the property in constant possession and use, claiming title thereto for more than ten years prior to defendant's trespass. This, of itself, would give title to the church upon which this action could be maintained. That portion of the lot which is termed the open space or common was fenced on three sides, the public road being the boundary on the fourth side, and there had been erected

within this partial inclosure hitching racks and stiles, for the convenience of those attending services in the church. These were used in connection with the church. When it is remembered that the congregation making use of these premises was from the surrounding country to a distance of eight miles, and came on horseback, in wagons and carriages, it can readily be seen that this ground was almost indispensable to the use of the church property. We are of the opinion that this character of use and possession for a continuous period of ten years was sufficient to vest the title, without the aid of the deed. The same can be said in answer to the objection to admitting parol evidence of the grantor's intention. The judgment is affirmed. All concur.

STATE OF MISSOURI, Respondent, v. F. W. TINDALL, 40 271
Appellant. 184 589

Kansas City Court of Appeals, March 31, 1890.

Selling Intoxicating Liquors: CLUB. The "make up" of a club room was in all respects similar to that of an ordinary dramshop; and the dramseeker was required to sign the articles of association and pay an admission fee of twenty-five cents, which clothed him with the privileges of membership and entitled him to buy and drink at the place whatsoever was carried in stock by purchasing a "requisition ticket," paying therefor ten or five cents as he might desire whiskey or beer. *Held*,—

(1) The transaction was a sale regardless of the purchaser's relation to the association, whether member or stranger.

(2) The refusal of the trial court to admit the "articles of association," etc., in evidence was harmless to the defense.

(3) That the defense was devoid of merit.

Appeal from the Saline Criminal Court.—HON. JOHN E. RYLAND, Judge.

AFFIRMED.

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Davis & Wingfield and *Cosgrove & Johnson*, for the appellant.

(1) The court erred in refusing to allow the articles of association, by-laws and minutes of meetings of the "Arrow Rock Social Club," to be read in evidence to the jury. They were competent to show the manner in which the business of the "club" was conducted. The question in the case was whether the method of doing business was honest, and for the purposes named in the articles of association and by-laws, or a device gotten up to evade the liquor laws of the state. The excluded evidence presented a question of fact for the jury to pass upon, and not a question of law for the court. (2) It was error for the trial court to hold, as it did in this case, that the delivery of the liquor, by defendants, to other members of the "club," was, as a matter of law, a sale and an evasion of the liquor laws of the state. *Commonwealth v. Pomphret*, 50 Am. Rep. 340; 139 Mass. 564; *Seim v. State*, 39 Am. Rep. 419; 55 Md. 556; 2 Thomp. Tr., sec. 2155; *State v. Clark*, 18 Mo. App. 531.

Alf. F. Rector, for the respondent.

The court excluded no proper evidence offered by the defendants. The articles of association of Arrow Rock Social Club were properly excluded; they constituted no defense to the charge. *Marmont v. State*, 1 Am. Crim. Reports (Hawley) p. 447; s. c., 48 Ind. 21; *Rickart v. People*, 2 Am. Crim. Reports (Hawley) p. 385; s. c., 79 Ill. 85; *Martin v. State*, 3 Am. Crim. Reports (Hawley) p. 287; s. c., 59 Ala. 34.

Gill, J.—Defendant Tindall was indicted, tried and convicted of selling intoxicating liquors at Arrow Rock, Saline county, Missouri, without having a license as a dramshop-keeper. From the judgment against

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him he has appealed to this court. Prior to December, 1888, defendant had been proprietor of a saloon at Arrow Rock, but on December 15, 1888, he entered into the management and charge of what was termed a "Club House," where it is claimed, the liquors and other refreshments were dealt out to members of the "Club" only. The "make up" of this club room was, in all respects, similar to that of an ordinary dramshop or saloon. Defendant Tindall and one Townsend had, apparently, complete control, and dealt out the whiskey, beer, etc., "after about this fashion:" The dramseeker, upon entering the "Club House" and asking for his chosen stimulant, would be answered by Tindall or his subordinate, Townsend, that to be entitled he must "join the Club." Thereupon, the applicant, by direction from Tindall (or Townsend) signed the articles of association, paid twenty-five cents as an admission fee, which clothed him with the privileges as member of the "Arrow Rock Social Club," and entitled such member to buy and drink at the place whatsoever was carried in stock. But to withdraw the institution further still from the semblance of an ordinary saloon, and add to the mysteries of this "Club House," the drinker was required to buy a "requisition ticket" (or "*chip*" as denominated by the habitues), paying therefor ten or five cents, as he might desire whiskey or beer, and this ticket, "chip," presented at the bar secured the coveted article. To sustain the indictment against defendant the state made proof of numerous and repeated disposals of intoxicating drinks to different parties from December 15, 1888, to March, 1889, the finding of the indictment.

I. The question here is one of law—there is no dispute as to the material facts, as we view the case. The statute law which defendant is charged with violating declares: "No person shall directly, or indirectly, sell intoxicating liquors in any quantity less than one

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gallon, without taking out a license as a dramshop-keeper." R. S. 1879, sec. 5436. Do the facts of this case constitute *a sale* of the intoxicating drinks so disposed of to the so-called members of the "Club?" Adopting the apparent views of the lower court we answer this question in the affirmative. A sale may be defined to be a transfer of the absolute or general property in a thing for a price in money. Benj. on Sales, sec. 1. Now, considering the facts here in the most charitable light for the defense, these drinks, disposed of to the members of the association, were sales. The whiskey, beer, etc., changed ownership in consideration of money then and there paid by the consumers. Call the club association a corporation, or a copartnership, or a mere voluntary society, and the character of the transaction remains the same. The party seeking the purchase of the liquor signs as a member and pays the twenty-five cents into the funds of the society, for the privilege of buying its goods; and, being admitted as a member, having paid the "gate money" and entered with the right to become a purchaser, he proceeds to buy of the "Club" of which he is now a member. The transaction too is a sale regardless of his relations to the association, whether member or stranger. *Martin v. State*, 59 Ala. 36.

This case is quite different from that of *State v. Clark* (18 Mo. App. 531) cited by defendant's counsel. There Clark and several others joined in purchasing a ten-gallon keg of whiskey, each contributing a certain proportionate part of the money needed when the whiskey was ordered. Clark received the keg of whiskey, and, in distributing the same as per agreement formerly made, delivered to one party a half gallon. For this he was indicted, and this court held, in effect, that this was not a sale by Clark, but that it was a joint purchase in the first instance and that Clark only gave over to each his portion thus purchased. While in the

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case *now* under consideration, defendant Tindall (acting as he says for himself and others composing a "Club") had gone into the market, stocked his establishment with whiskey, etc., to be sold (at a profit, too) to whomsoever should join the "Club" by signing his name to the articles of association, and paying the sum of twenty-five cents every quarter. It follows, then, from what we have already said that the action of the trial court in rejecting the "articles of association, by-laws, etc., of the Arrow Rock Social Club" was harmless to the defense of this action. We have examined this proffered evidence and see nothing therein that could possibly aid in this defense. The facts remain, that, whether in proper person or as agent for the "Social Club," defendant was daily engaged in selling intoxicating liquors in quantities less than one gallon, clearly in contravention of the laws of this state.

But even beyond all this the defense is so entirely devoid of merit, and this "Club" scheme such a palpable sham, that, in my judgment, the lower court was justified in refusing to admit in evidence the so-called "articles of association." In the language of the supreme court of Illinois in a case quite parallel: "All this is plainly a device on the part of the defendant to avoid the provisions of the law, and to enable him to sell intoxicating liquors at retail, as he had formerly done, without first obtaining a license to keep a dramshop. The whole thing was a subtle artifice, planned with a view to avoid the penalties denounced against persons violating the law." *Rickart v. The People*, 79 Ill. 90; *Marmont v. The State*, 48 Ind. 21.

We have read and considered all the evidence offered as well that admitted as rejected, and conclude on the undisputed facts of this case the judgment was for the right party, and ought to be affirmed, and it is so ordered. The other judges concur.

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L. L. GRIGSBY, Appellant, v. GERMAN INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, March 31, 1890.

1. **Insurance: LIMITATION ON PROOF OF LOSS AND COMMENCEMENT OF SUIT.** A provision of an insurance policy, requiring suit to be brought within six months next after the loss or damage shall occur, means six months from the date of the loss, and not from the ascertainment of the amount thereof; and this, too, notwithstanding said policy contained a provision that proof of loss should be made in sixty days after the loss.

2. ——— : FAILURE TO DISCLOSE TITLE. Where the policy of insurance requires a disclosure of the title to the property insured, if the assured does not disclose his title or discloses a false one, he cannot maintain an action on the policy.

3. ——— : EXAMINATION UNDER OATH AND SUBSCRIPTION THERETO. Where the assured submits to an examination under oath as required by the terms of the policy, he has a reasonable time in which to consult with his attorney before signing the same, but this will not avail plaintiff as an excuse for failing to make proof of loss within the specified time, where, as in this case, half of the time limited remained and the assured did not consult his attorney during the currency of such time.

4. ——— : WAIVER : ESTOPPEL. There should be something in the conduct of the insurer in the nature of an estoppel in order to constitute a waiver of a condition in an insurance policy.

Appeal from the Caldwell Circuit Court.—HON. J. M. DAVIS, Judge.

AFFIRMED.

Statement by the court.

The following is an agreement introduced in evidence, which relates to the property insured:

"This agreement by and between W. H. H. Frye and L. L. Grigsby witnesseth: That the copartnership heretofore existing between said parties under the style

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of 'Frye & Grigsby' is dissolved. Grigsby is to take all the assets of the said firm, including all goods, wares and merchandise, notes, accounts and trade fixtures; said assets being shown by invoice made on the tenth day of July, 1883; and he is to pay all debts and liabilities of the firm, outstanding and unpaid; and to protect Frye from loss on said account. Grigsby, for the use of Frye's share of the capital stock, which is forty-six hundred and ninety-six and seventy-hundredths dollars, as shown by said invoice, and which is to be left in Grigsby's control, is to pay Frye ten dollars per week, payable on Saturday, November 17, 1883, and every Saturday thereafter until November 10, 1884. At the end of one year Grigsby shall have the option of taking the said stock at $4,696.70, provided the same has not been in the meantime sold, as hereinafter provided. On payment of said sum to Frye a perfect title to all said assets shall vest in Grigsby; and Frye shall execute all instruments necessary to perfect his title.

"Each party reserves the right to sell, assign and transfer all his share in said stock and assets, provided the consent of the other is first obtained; and no transfer is to be made without the consent of the other. If Frye shall sell his interest the obligation of said Grigsby to pay to the said Frye weekly installments shall cease. Grigsby is not to suffer the stock to decrease below $4,696.70 at a fair invoice price during the year. If he shall do so said sum of $4,696.70 shall become immediately due Frye and thereafter said sum shall bear interest at ten per cent. Grigsby is not hereafter to use the firm name in purchasing goods, etc., but all purchases shall be made on his individual credit and account. He shall have no right to attach the firm name to any commercial paper, or to use it in any way except in settling outstanding notes and accounts due the firm. If Grigsby does not choose to take the

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stock at the end of the year at $4,696.70, then the partnership shall be resumed on the conditions heretofore existing; or the stock shall be disposed of in such manner as they shall agree on; Frye being entitled to $4,696.70 out of the proceeds or in the capital of the new firm. Executed in duplicate this tenth day of November, 1883. W. H. H. FRYE,

"L. L. GRIGSBY."

The following further agreement was likewise introduced:

"This agreement between W. H. H. Frye and L. L. Grigsby witnesseth: That the interest of the said Frye in the stock of goods, wares and merchandise, now under the control of said Grigsby, at Hamilton, Missouri, is reduced to the sum of three thousand dollars; and his interest in the store building to seven hundred and fifty dollars. Now it is agreed that Frye will leave said interest in said stock in the hands of the said Grigsby for another year from November 10, 1885, upon the following agreements and conditions: Said Grigsby is to have the privilege of discharging the interest of said Frye in the said stock of goods at any time within the year by paying said Frye said sum of three thousand dollars and interest from November 10, 1885, at six per cent. per annum; interest payable semi-annually. Grigsby to have the privilege of paying in such installments as may suit him, but such installments shall not be less than one hundred dollars. He is also to have the privilege of paying in cash or good solvent notes, bankable, such as may be approved by Houston, Spratt & Menifee; but Grigsby is not to be held as indorser on any such notes as may be received or accepted by said Frye. On payment as aforesaid in money or notes, the interest of said Frye in the said stock of goods shall be reduced by the amount of such payment. Grigsby is to have the stock insured in the sum of three thousand dollars, loss payable to Frye as his interest may appear

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at the time of loss, in case of loss by fire. Such policies to be taken out on or before January 1, 1886, for one year.

"Grigsby is to have the privilege of buying the interest of Frye in the store building, now occupied by said Grigsby, by paying said Frye therefor the sum of seven hundred and fifty dollars, with interest thereon at eight per cent. from November 10, 1885; payable semi-annually. In case he shall not purchase the building on or before the year 1885 from November 10, he shall pay rent for its use, sixty dollars a year, payable semi-annually. The rent begins November 10, 1885. In case of purchase and payment of purchase price in full, Frye shall convey, by warranty deed, a one-half interest in the half lot on which the building stands; also one-half interest in the front building, forty feet; and the whole of the rear building. Frye shall have a lien on the goods in the store, or which hereafter may be placed in the store, as security of the payment of his interest in the sum of three thousand dollars; but such lien shall not interfere with the right of Grigsby to sell and dispose of the same at such price and upon such conditions as he may see fit. Grigsby covenants that he will from time to time replenish such stock of goods, so that the fair market value thereof will be equal to the interest of Frye in the same, including interest and rents. In the witness whereof the parties have signed duplicate copies hereof this November 25, 1885.

"W. H. H. FRYE,
"L. L. GRIGSBY."

Johnson & Wait and *W. A. Wood*, for the appellant.

(1) By entering on an examination of the value of the goods and circumstances attending the loss, and calling in the aid of the plaintiff and his agents, the defendant waived preliminary proofs of loss. *Badger v. Ins. Co.*, 49 Wis. 396; *Okey v. Ins. Co.*, 29 Mo. App.

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105; *Ins. Co. v. Davis*, 98 Pa. St. 280; *Thierolf v. Ins. Co.*, 110 Pa. St. 37. (2) Grigsby's refusal to sign the written examination until he could consult his attorney was a good ground for declining to sign at that time. *Phillips v. Ins. Co.*, 14 Mo. 220. (3) By refusing to return the examination of Grigsby for amendment, the company waived all objections to failure to sign. *Findeisen v. Ins. Co.*, 57 Vt. 520. (4) By placing their refusal to proceed with the adjustment, and pay his claim, on the ground of the refusal of Grigsby to sign his examination, the defendant waived all other objection to the proofs. *Daul v. Ins. Co.*, 35 La. Ann. 38. The proofs furnished were reasonably certain, and were sufficient. *Erwin v. Ins. Co.*, 24 Mo. App. 145. (6) To constitute an "absolute interest" in the goods, it was not essential that his title should be the entire and exclusive title to the same. May on Ins., sec. 288; *Lebanon v. Erb*, 112 Pa. St. 149. (7) As the policy is ambiguous, that interpretation should be put on it which is most favorable to Grigsby. *Brown v. Ass'n Co.*, 45 Mo. 221.

G. W. Barnett, for the respondent.

(1) The court did right in sustaining the demurrer to the evidence. The alleged loss occurred September 30, 1886, and suit was brought April 28, 1887, more than six months after the loss. *Bradley v. Ins. Co.*, 28 Mo. App. 7; *Glass v. Walker*, 66 Mo. 32; *Fullam v. Ins. Co.*, 7 Gray, 61; *Johnson v. Ins. Co.*, 91 Ill. 92; *Keirn v. Ins. Co.*, 42 Mo. 38; *Ins. Co. v. Weiss Bros.*, 106 Pa. St. 20; *Reddlebergher v. Ins. Co.*, 7 Wall. 386. (2) Under the contracts read in evidence by the plaintiff, he was not the sole, absolute and unconditional owner of the property insured, and, as he insured as such, he cannot recover. *Milling Co. v. Ins. Co.*, 25 Mo. App. 259; *Barnard v. Ins. Co.*, 27 Mo. App. 26;

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Ins. Co. v. Barnett, 73 Mo. 364; *Reithmuller v. Ins. Ass'n*, 20 Mo. App. 264. (3) Plaintiff could not recover because the policy provides that "the assured shall, if required, submit to an examination on oath by the company's adjusting agent, and subscribe to such examination when reduced to writing, and until such examination is permitted the loss shall not be payable." Although plaintiff submitted to an examination, he refused to sign the same, and, having refused to comply with this condition of the policy, cannot recover. *Phillips v. Ins. Co.*, 14 Mo. 220; 2 Wood on Fire Ins., sec. 449, p. 989, and cases cited; *Titus v. Ins. Co.*, 9 Ins. Law. Jour. (N. Y.) p. 664. (4) The plaintiff did not furnish proofs of loss within sixty days, required by the policy, and, hence, cannot recover unless there was a waiver. Plaintiff was not misled by anything the adjuster did or said, because he dealt at arm's length with him. He said he did not rely on what the adjuster said, but put the matter in the hands of a lawyer. Before there can be a waiver of proofs of loss, there must be something said or done by the company's agent, while there is yet time to make the proofs, which has thrown plaintiff off his guard and led him to believe that proofs would not be required. *Underwood v. Ins. Co.*, 57 N. Y. 500; *Blossom v. Ins. Co.*, 64 N. Y. 162; *Ins. Co. v. Weiss Bros.*, 106 Pa. St. 20; 2 Wood on Fire Ins. [2 Ed.] pp. 943, 944, 945, 946 and 980 and notes; *Ins. Co. v. Sennett*, 41 Penn. 161; *Briggs v. Ins. Co.*, 8 W. Rep. (Mich.) 124; 2 Wood on Fire Ins. [2 Ed.] p. 946; *Blossom v. Ins. Co.*, 64 N. Y. 162.

Ellison, J.—This action is on a policy of insurance containing a provision that a proof of loss should be made in sixty days and that "no suit or action of any kind against this company for the recovery of any claim under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit

or action shall be commenced within the term of six months next after the loss or damage shall occur; and, in case any suit or action shall be commenced against this company after the term of six months after the loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive against the validity of such claim thereby attempted to be enforced, any statute of limitation, the contrary notwithstanding." The loss occurred September 30, 1886, and this suit was commenced April 26, 1887, being more than six months.

At the conclusion of plaintiff's case the trial court gave an instruction in the nature of a demurrer to the testimony and plaintiff has appealed. The suit having been instituted more than six months after the loss occurred, we must hold, under former rulings of this court and the supreme court, that it cannot be maintained. *Glass v. Walker*, 66 Mo. 32; *Bradley v. Ins. Co.*, 28 Mo. App. 7; *Thompson v. Railroad*, 22 Mo. App. 321. Notwithstanding there were sixty days after loss in which proof of loss should be made and that the amount of the loss was not payable till sixty days after the loss should be ascertained in accordance with the terms and conditions of the policy, yet the provisions above quoted, requiring suit to be instituted within six months, means six months from the date of the loss and not from an ascertainment of the amount thereof.

II. By reference to the two agreements between plaintiff and W. H. H. Frye concerning the stock of goods insured, it will appear quite conclusively that plaintiff's interest or title was not absolute. That Frye had an interest which should have been disclosed. This, of itself, was sufficient to justify the demurrer to the testimony under the following provision of the policy: "2. If the interest in the property be a leasehold, rental, mortgagee's or other undivided partnership interest, or a building standing on leased ground, or

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other interests not absolute, it must be so represented to this company, and expressed in this policy in writing; otherwise this insurance shall be void." Such provisions in an insurance policy are reasonable and are enforced by the courts and if the assured will not disclose his true title or discloses a false one, he has but himself to blame for his loss. *Milling Co. v. Ins. Co.*, 25 Mo. App. 259; *Barnard v. Ins. Co.*, 27 Mo. App. 26.

III. The policy contained the following provision: "The assured shall, if required, submit to an examination on oath by the company's adjusting agent and subscribe to such examination when reduced to writing, and until such examination is permitted the loss shall not be payable." Plaintiff submitted to an examination under oath but refused to subscribe his name. He should have done so unless there was some good reason to the contrary. *Phillips v. Ins. Co.*, 14 Mo. 220; 2 Wood Fire Ins., sec. 449, and note thereto. His excuse for not signing was that he wanted to consult his attorney as to whether it would be proper for him to sign. We are of the opinion that plaintiff had the right to reasonable time in which to consult his attorney before signing the examination. In his situation it was but natural that he should exercise caution and that he should want to learn what legal bearing the examination would have. But this will not avail plaintiff, under the circumstances that have been developed by the testimony, as an excuse for failing to make proof of loss within the time specified. At the time the refusal occurred there was yet left more than half of the time limited, within which he could have consulted his attorney, signed his examination and made up his proof. But he never consulted his attorney during the currency of the time he should have made his proof, for on December 27, nearly ninety days after the fire, his attorney wrote that he would have plaintiff sign the statement unless it contained some "flagrant mistake"

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and that he "*was not aware before of his, plaintiff's, refusing to sign.*"

Plaintiff testified that defendant's agent was not pleased with his refusal to sign the examination and that he "told me (him) to take the policy and abide by it." He further stated that he anticipated trouble with the company. That he hired a lawyer and did not rely upon the agent. There should be something in the conduct of the insurer in the nature of an estoppel in order to constitute a waiver of such conditions in the policy. *Gale v. Ins. Co.*, 33 Mo. App. 664. It is apparent that plaintiff was not being deceived or misled by the conduct of the defendant's agent. He was not lulled into a false security and thereby prevented from doing that which, but for the conduct of the agent, he would have done. He testified, in effect, that he relied upon himself and his attorney, and that he was told that he must abide by the terms of his policy.

He does state that he was not told at that time that he must furnish his proof, but he was told to comply with the policy which required the proof. The judgment is affirmed. All concur.

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STATE OF MISSOURI, Respondent, v. FRITZ BRINKMAN, Appellant.

St. Louis Court of Appeals, April 1, 1890.

1. **Criminal Law: ABANDONMENT OF WIFE: INFORMATION.** An information, charging an abandonment of the wife and a failure to provide for her, is sufficient, if it charges the offense in the language of the statute. (R. S. 1879, sec. 1273.)

2. ——— : ——— : **ESSENTIAL ELEMENTS OF OFFENSE.** To establish a case of the criminal abandonment of a wife by the husband and his failure to support her, the state must establish not only that the

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husband abandoned and failed to provide for the wife, but also a criminal intent on his part to abandon his wife without good cause.

3. **Criminal Law:** APPELLATE PRACTICE. When the evidence in the trial of a criminal prosecution is insufficient in law to establish the offense charged, the defendant, on appeal, is entitled to a discharge in the appellate court.

Appeal from St. Louis Court of Criminal Correction. HON. R. A. CAMPBELL, Judge.

REVERSED (*and defendant discharged*).

Charles E. Donahue, for the appellant.

J. R. Claiborne, Prosecuting Attorney, for the respondent.

BIGGS, J., delivered the opinion of the court.

The defendant was arrested, tried and convicted, upon an information filed by the assistant prosecuting attorney of the St. Louis court of criminal correction. It was charged in the information that the defendant in the city of St. Louis, on or about the first day of January, 1889, did unlawfully, without good cause, abandon his wife, and did neglect, refuse and fail to provide for her," etc. The information was drawn under section 1273 (Revised Statutes, 1879), which is as follows: "If any man shall, without good cause, abandon or desert his wife * * * and shall fail, neglect or refuse to maintain and provide for such wife, * * * he shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by a fine of not less than fifty, nor more than one thousand, dollars, or by both such fine and imprisonment," etc. The defendant was found guilty by the court and a fine of five hundred dollars was imposed. From this judgment of conviction the defendant has appealed.

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No briefs have been filed on either side, hence we are left to our own research to ascertain whether any prejudicial error was committed in the trial of the cause.

The information charges the offense in the language of the statute, and the supreme court in the case of *State v. Davis*, 70 Mo. 467, decided that an indictment under this section of the statute, which adopted its language, was sufficient. We must, therefore, hold that the information is sufficient.

There was no objection to the admission or rejection of evidence, and there were no instructions asked or given, so there is nothing to complain of on that score. The only remaining question pertains to the sufficiency of the evidence to authorize a conviction. The defendant at the close of the state's case asked for his discharge upon the ground that the evidence adduced was not sufficient to establish an offense under the law. The court overruled this motion and the defendant excepted. The defendant again renewed his motion at the close of the case.

If we adhere to the doctrine declared by this court in the case of *State v. Greenup*, 30 Mo. App. 299, the conviction in this case will have to be set aside, and the defendant discharged. In the case referred to, we held that two elements were essential to constitute the offense of wife abandonment: *First*. The criminal intent to abandon without good cause. *Second*. The failure to provide for the wife. In discussing the requisite proof to establish these propositions the court said: "Evidence of a mere abandonment and a subsequent failure and refusal of support does not prove the criminal offense denounced by the statute. The state must further show that the defendant had not 'good cause' for the abandonment. The state must show this, although it involves the necessity of proving a negative. * * * Where proof of the negative is not from the nature of the case impossible, the general rule is, that the party sustaining the burden of proof must give some evidence

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in support of his negative averment, in order to shift the burden of proof and require an explanation from the other party."

In the present case the only witness introduced by the state was the defendant's wife. Her testimony, as preserved in the bill of exceptions, was as follows: "I am the wife of the defendant, and have been married to him over twenty years; he abandoned me about two years and seven months ago; he has not given me any support or money since the first day of January, A. D. 1889; this was in the city of St. Louis and state of Missouri."

CROSS-EXAMINATION.

"*Q.* When did you leave your husband? *A.* When that little child (pointing to a child) was four months old.

"*Q.* How old is that child now? *A.* Three years.

"*Q.* Why did you leave him? *A.* He would not pay anything; he would not pay the rent, nor the butcher's bill; he forced me to leave him.

"*Q.* Is it not a fact that you left him about ten o'clock in the morning while he was at work, and he came home to an empty house at night? *A.* Yes.

"*Q.* Have you not received money from your husband since you and he were separated? *A.* Yes, I received money from him up to the first of January, A. D. 1889, but not a cent since."

This was all the evidence offered by the state.

The defendant testified: "My wife left me while I was at work; I came home at night and found an empty house; the rooms bare of furniture, nothing left but a straw mattress; my wife and family gone, I knew not where.

"*Q.* How much do you make a week? *A.* Fifteen dollars."

The defendant then introduced testimony tending to prove that he paid all his bills as they matured. This was all the evidence in the case.

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It is quite clear that the state failed to show by satisfactory proof that the defendant with criminal intent abandoned his wife without "a good cause." The reasons assigned by her for leaving her house were, if true, insufficient to justify her in the course pursued. According to her own statement she abandoned her husband, while he was at work, without notice or warning to him of her intentions. The only excuse given by her for such unusual conduct was that her husband failed to pay his bills. In addition to this, the bare statement was made that the defendant "forced her to leave him." Why, or in what manner, the defendant forced her to leave was left to conjecture. It devolved on the state to have the witness explain this statement, and give the facts, in order that the court might judge of its truth or falsity, and also to afford the defendant an opportunity to refute any such charge. But, aside from this, the truth of this assertion is fairly contradicted by the wife's admission that she abandoned her home during the defendant's absence, and that he had no notice whatever of her intentions. In addition she admitted that the defendant supported her for two years after she had abandoned his house and stripped it of every article of furniture. We must, therefore, hold that the assertion by the defendant's wife that he forced her to leave him, having no support in other facts and circumstances in evidence, cannot be considered as any evidence that the defendant abandoned her, without "good cause." Outside of this statement there is no evidence tending to prove that the abandonment was with criminal intent and without good cause.

Our opinion is that the court committed error in refusing to discharge the defendant, and, as the evidence was insufficient in law to make out the offense, he is entitled to his discharge in this court. In such a case it is our duty to make such judgment as the trial court

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ought to have made. *State v. Fuchs*, 17 Mo. App. 458; *State v. Greenup*, *supra.*

The judgment of conviction in this case will, therefore, be reversed and set aside, and the defendant discharged. All the judges concurring, it is so ordered.

LOUISE MEYER, Respondent, v. ELIJAH F. STONE, Appellant.

St. Louis Court of Appeals, April 1, 1890.

1. **Practice, Appellate:** WEIGHING THE EVIDENCE. If a verdict is supported by substantial evidence, it will not, on appeal, be disturbed on the ground that it is against the weight of the evidence.

2. ——— : ERRORS ASSIGNED BY THE APPELLEE. When there is no cross-appeal, the appellee is not in a position to complain of the judgment appealed from.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Stone & Slevin, for the appellant.

(1) Where the verdict is manifestly against the evidence and instructions, the supreme court will interfere and reverse the judgment. *Ackley v. Stacklin*, 56 Mo. 558; *Dodo v. White*, 50 Mo. 241; Graham & W. on New Trials, 1311. (2) There was no evidence to support the verdict of the jury, and a new trial should have been granted. (3) The instruction asked by the defendant should have been given. (4) The plaintiff's attorney waived the right to service of notice of the appeal taken from the judgment of the justice.

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McDonough v. Daly, 3 Mo. App. 606; *Wolff v. Light Co.*, 70 Mo. 182. And, if there was any defect in this respect, it was waived by the plaintiff's appearance in the circuit court. *Deatley v. Potter*, 29 Mo. App. 222; *Page v. Railroad*, 61 Mo. 78.

C. M. Napton, for the respondent.

The testimony of the plaintiff and her daughter establishes a *prima facie* case, and, that being done, this court will not weigh the evidence. The instruction asked by the defendant was properly refused. It singles out particular facts; it is argumentative and comments on the evidence; it does not cover the entire case; and it is not predicated on the evidence. The plaintiff's motion in the circuit court to affirm the judgment of the justice of the peace should have been sustained. The service of the notice of the appeal was made on the plaintiff's attorney, and that is insufficient. The right of the plaintiff to urge this objection was not waived by the attorney's acknowledgment of the service made on him. The only thing, which was thereby waived, was the necessity for a return of that service. *Fuller v. McClure*, 25 Mo. App. 418; *Jordan v. Bowman*, 28 Mo. App. 610.

Biggs, J., delivered the opinion of the court.

In this case there was a judgment for plaintiff for one hundred and twenty-five dollars, and if the verdict of the jury, on which the judgment was entered, is supported by any substantial evidence, then the judgment must be affirmed. The record presents no other question.

It appears that the defendant, who is an attorney at law, represented the plaintiff in the collection of a claim in her favor against the "United Order of Honor." The claim was for three thousand dollars, and was based on a certificate of insurance issued on

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the life of plaintiff's deceased husband. In the present action the plaintiff sued the defendant for one hundred and seventy-five dollars, which she claimed had been collected by defendant from the insurance company. The defendant admitted that he had collected the money, but claimed that, under his contract with plaintiff, he had a right to retain it as part of his compensation. The plaintiff denied this, and the issue thus presented involved simply an inquiry as to the contract between plaintiff and defendant in respect of the latter's fees.

We may in the first place suggest that it is entirely immaterial, whether or not the parties in the beginning made a contract in reference to the amount of compensation which the defendant was to receive for collecting the claim against the insurance company, for the reason that such contract (if made) was subsequently set aside and an entirely new agreement substituted. The testimony of both parties justifies this conclusion. We will, therefore, not incumber this opinion with a discussion of the differences between the parties touching the original contract, if any such contract was actually made.

It appears from the record that some time after the claim had been placed with the defendant for collection, and after he had made a trip to Indianapolis to see the general officers of the insurance company in reference to its payment, the plaintiff concluded that she would employ another attorney and so informed the defendant. Thereupon the defendant offered to withdraw from the case, but to this the plaintiff would not consent. The defendant then demanded that a definite contract be made as to his compensation. The defendant's evidence tended strongly to show that it was then agreed that he should be paid three hundred dollars for his services, and that his compensation was not made to depend upon any contingency. On the other hand, we think that the plaintiff's evidence had some tendency

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to show that the defendant was to receive three hundred dollars in the event that the entire amount of the claim was collected.

It appears from the record that the plaintiff is a German woman, who speaks the English language very imperfectly; hence, we must rely chiefly on her daughter's testimony for her version or understanding of the contract. Before going into an examination of plaintiff's evidence touching the contract, it will be necessary, to a proper understanding of it, to state that soon after the contract had been made with defendant touching his fees, an understanding was arrived at with the insurance company. It was agreed that the plaintiff should receive the amount of one assessment against the members of the order, which in amount should be not less than twenty-five hundred dollars and not more than three thousand dollars. The money was to be paid in monthly payments of two hundred and fifty dollars. The company paid in cash on this settlement two hundred and fifty dollars, and subsequently paid three installments of two hundred and fifty dollars each; then it became insolvent. Nothing more was realized on the claim. The defendant collected the three installments, and he reserved from each the sum of seventy-five dollars on account of his fee. The defendant's evidence tended to prove that, at the time the claim was adjusted, it was agreed that he should deduct from each payment the sum of seventy-five dollars, until he had received the amount of his fee.

As before stated, but little information can be gotten from the plaintiff's own evidence. Her testimony as preserved in the record is quite unintelligible, and she evidently did not comprehend fully the questions propounded to her. Concerning the last contract we extract the following:

"*Q.* But wasn't Stone to receive three hundred dollars for his pay? Do you understand my question? *A.* I can't understand it very well.

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"*Q.* The question is this: Didn't you tell Mr. Stone that he could have three hundred dollars for his fee? *A.* If he collected the full amount.

"*Q.* What full amount? Twenty-five hundred or three thousand dollars? *A.* Three thousand dollars.

"*Q.* Didn't you make an arrangement with the benevolent association by which you agreed to receive twenty-five hundred dollars in full on your claim against it? *A.* I can't remember."

Minnie Meyers, the plaintiff's daughter, was present during the negotiations between the defendant and her mother, and her testimony concerning the defendant's contract for fees was as follows:

"*Q.* Wasn't there a contract made between your mother and Mr. Stone at his office on Broadway and Olive, subsequent to the date of this instrument which has been shown here, by which Mr. Stone was to receive three hundred dollars in full for his services? *A.* Not a written contract.

"*Q.* Was there a verbal contract made at that time? *A.* If my mother was to receive the full insurance, the full amount of the insurance?

"*Q.* If your mother was to receive the full amount of the insurance? *A.* Yes, sir.

"*Q.* And Mr. Stone was not to receive his fee, unless there was collected the full amount of the insurance? *A.* Yes, sir."

The witness admitted that, at the time of the settlement with the company, her mother consented that the defendant should retain from each monthly installment the sum of seventy-five dollars, until he had received the amount of his fee.

That the defendant established by a preponderance of evidence that he was to receive absolutely three hundred dollars, we may concede, yet it is not necessary to remind counsel that this court has nothing to do with the weight of evidence. On the hearing the triers of the fact decided against the defendant on this question,

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and the only question for us is, does the verdict find any support in the evidence. The evident theory adopted by the jury was that the defendant was to receive three hundred dollars for his services, provided the whole amount of the claim was collected, and if only a portion of the debt was realized, then he was to be paid in proportion to the amount actually collected. We are of opinion that this view is fairly inferable from the plaintiff's evidence, and in aid it may be said that it is quite equitable. At all events, we would not be justified in holding that the statements made by plaintiff and her daughter do not furnish substantial evidence in support of the judgment. It is true, as contended by the defendant, that the plaintiff agreed at the time the adjustment was made with the insurance company that he might retain seventy-five dollars out of the monthly installments, until he had collected his fee of three hundred dollars; but this arrangement may have been, and doubtless was, acceded to by the plaintiff on the assumption that the company would pay the full amount of the claim. There was collected only one-third of the debt, to-wit, one thousand dollars, and the jury evidently found that, under the contract, the defendant was entitled to only one-third of the fee, to-wit, one hundred dollars. He had retained two hundred and twenty-five dollars leaving a balance due the plaintiff of one hundred and twenty-five dollars. This was the amount of the judgment.

The plaintiff's statement set forth what she claimed to be the original contract between her and the defendant in reference to the latter's employment and the amount of his compensation, and she alleged that by its terms the defendant was only entitled to retain the sum of fifty dollars for his services. It was then averred that the defendant had collected two hundred and twenty-five dollars from the insurance company, and that the plaintiff was entitled to a judgment for one

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hundred and seventy-five dollars. The defendant's contention is that the plaintiff should be held to strict proof of the alleged contract, and that, if she fails in this, then the judgment must be for defendant. An instruction to that effect was asked, and we think was very properly refused. The action was to recover money belonging to plaintiff which had been received and improperly retained by the defendant, and the statement by plaintiff of the contract was a mere matter of inducement. The suit was not based on the contract.

The plaintiff obtained a judgment before the justice of the peace for one hundred and seventy-five dollars. She claimed in the circuit court that a proper notice of appeal had not been served, and she filed a motion for an affirmance on that ground. The court overruled the motion, and plaintiff contends that this action of the court ought to be reviewed by us. This question may be disposed of with the observation that the plaintiff is not an appellant, and is in no position to complain. If she felt aggrieved by the action of the court in overruling the motion to affirm, she ought to have taken a cross-appeal.

Finding no error in the record, we will affirm the judgment. All the judges concur.

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CHAS. H. SAWYER, Respondent, v. JOHN R. CHRISTIAN, Appellant.

St. Louis Court of Appeals, April 1, 1890.

Contracts: INDEPENDENT AGREEMENTS. The mutual contracts of two contracting parties are independent, and a breach by one of the parties of an agreement to be performed by him is no defense to an action instituted by him against the other party for a breach of the agreement on the part of the latter, if the agreements of the

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several parties, thus broken, were to have been performed at different times, and if the agreement violated by the party suing goes only to a part of the consideration for that violated by the party sued, and compensation for the violation of it can be made in damages.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Christian & Wind, for the appellant.

As the contract made no provision for the return of the money, except on a trial of the cause, the court has no power to add to it words or conditions which were omitted in the contract. *Johnson v. Treadway*, 33 Mo. App. 122; *Gavinrel v. Crump*, 22 Wall. 308. The court, by instruction number three, virtually admits that the testimony established the facts of the contract as stated in defendant's answer, but construes it as an independent and not a conditional undertaking. This is certainly erroneous.

R. L. McLaran, for the respondent.

(1) In effect, a dismissal of a cause is a final judgment in favor of defendant, and, although it may not preclude plaintiff from bringing another suit, yet for all purposes connected with the proceedings in the particular action the rights of the parties are affected by it in the same manner as if there had been a final adjudication upon the merits. Freeman on Judgments [3 Ed.] secs. 16, 17, notes 2–4; *Dowling v. Polack*, 18 Cal. 625; *Leese v. Sherwood*, 21 Cal. 151–64; *Boggess v. Cox*, 48 Mo. 278. (2) A party cannot accept and make his own the benefits of a contract, and then, by his own act, repudiate its obligations as to himself. *Tureman v. Stephens*, 83 Mo. 218. (3) The first

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instruction given for respondent was proper. *Sampson v. Iron Works Co.*, 6 Gray, 120; *Hotbam v. East India Co.*, Wille's Rep. 157, note *a; Smith v. Crews*, 2 Mo. App. 269.

BIGGS, J., delivered the opinion of the court.

The plaintiff brought suit to recover of the defendant the sum of four hundred dollars with interest, and his alleged right of recovery was based on the following written contract, to-wit:

"ST. LOUIS, November 20, 1886.

"I hereby acknowledge the receipt by me from Charles H. Sawyer of four hundred dollars, to be retained or returned on the following conditions, to-wit: At any time within six months that C. H. Sawyer may pay to me six hundred dollars additional, I agree to dismiss and acknowledge satisfaction of all accounts or demands sued on by me in case number 67,534, room number 3, circuit court of St. Louis, *versus* C. H. Sawyer, dividing the costs equally. In case no such additional payment is made and said cause is tried, I agree, in case of the judgment thereon in my favor, to place said four hundred dollars as a credit thereon; but, in case of the judgment in favor of said Sawyer or against me, I hereby agree at once to return said four hundred dollars to him; until the happening of such aforesaid conditions and contingencies, I will hold the said four hundred dollars in trust only, and the fact of my holding the same, nor any of the terms of the obligation, shall be no admission nor used as such against said Sawyer on the trial of said cause between us in case the same is tried.

"JOHN R. CHRISTIAN."

The plaintiff averred that he did not exercise the right reserved in the contract to pay six hundred dollars in discharge of the claim held against him by defendant, but that, on the contrary, he demanded that the case of Christian *v.* Sawyer be set for trial; that the

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same was docketed for hearing on the twenty-fourth day of May, 1887, and, when called for trial, it was, on the motion of the plaintiff therein, dismissed and judgment entered accordingly. The plaintiff then alleged a demand on defendant for a return of the four hundred dollars deposited with him and his refusal to pay the same.

The defendant, after making a general denial, interposed special defenses to the effect that the writing sued on did not contain the entire agreement; that there were several other matters of difference between plaintiff and defendant, which were adjusted at the same time and formed parts of the agreement, but which were not mentioned in the writing, to-wit: That the defendant, as attorney for Ewing, Hill & Co., had obtained a judgment against plaintiff which the latter agreed to pay; that there were several suits between the parties (other than the one mentioned in the contract) then pending, which were to be dismissed, and in addition to this the plaintiff (Sawyer) agreed to pay a certain portion of a special tax for which the plaintiff and defendant were jointly liable. The defendant then claimed, as a defense and bar to the prosecution of this suit, the failure and refusal of plaintiff to pay the special tax according to his agreement. The defendant also claimed and urged as a further defense that the case of Christian *v.* Sawyer had never been tried in the manner contemplated by the contract; that a fair construction of the contract meant a trial and judgment on the merits; that the account sued on did not belong to the defendant herein, but had only been assigned to him for collection by his clients, concerning which Sawyer was advised; that, when the case was called for trial, the court refused a continuance and compelled the defendant to take a non-suit. It was then averred that the account sued on in the case of Christian *v.* Sawyer was reassigned to the real owners, and suit was immediately reinstated against Sawyer.

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The defendant introduced testimony tending to prove the affirmative defenses set forth in his answer.

The plaintiff in rebuttal offered evidence tending to show that he did not know that the assignment of the account to Christian was only for the purposes of suit; that the other agreements referred to by the defendant, and which had been performed by the plaintiff, were made with his attorneys, but plaintiff denied that any contract was made concerning the payment by him of any portion of the special tax.

The court sitting as a jury rendered a judgment against the defendant for the sum of four hundred and twenty-eight dollars, and from this judgment the defendant has appealed to this court.

The court held as a matter of law that, even though the plaintiff did agree to pay the special tax, and this agreement was one of the inducements for the making of the contract sued on, yet this contract, or agreement, would not constitute a bar to this suit, but would only support the right of the defendant to a counter-claim for the amount of the special tax, had it been pleaded as such. By this instruction the court decided that the agreement of the plaintiff to pay the special tax (if he made any such agreement) was an independent covenant and that its performance by plaintiff was not a condition precedent to his right to maintain this action.

The defendant complains of this instruction, and this constitutes his first assignment of error. The discussion of this instruction necessarily leads to some inquiry touching the nature and difference between dependent and independent covenants. A covenant is said to be dependent when its performance depends upon the prior performance of another act, by the other contracting party, and, until the prior act is done, no right is vested in the party who ought to perform it. The converse of this constitutes an independent covenant. It is sometimes difficult to determine the character of a covenant and the intention of the parties

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in reference thereto, but the supreme court of Missouri in the case of *Turner v. Mellier*, 59 Mo. 526, has formulated a very correct rule by which this question may in most cases be satisfactorily settled. The court said: The general rule is, that, when covenants on the part of different parties are to be performed at different times, they will be considered to be independent covenants, and a breach of one can be sued for without alleging or proving the performance of the other. Another rule is, that where the covenant goes only to part of the consideration of both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and consequently an action may be maintained for a breach of such covenant on the part of the defendant without averring performance of other covenants on the part of the plaintiff." This court in the case of *Smith v. Crews*, 2 Mo. App. 269, announced the same doctrine.

The application of either of the foregoing rules to the conceded facts will produce a ruling adverse to the defendant in reference to this assignment of error. It is fairly deducible from the defendant's own evidence that the plaintiff was to pay the special tax immediately or at least within a reasonable time. The repayment of the four hundred dollars by defendant was not to be made until the trial of the case of Christian *v.* Sawyer, and the plaintiff had six months to determine whether there should be a trial or not; therefore, it is very clear that it was within the contemplation of both parties that the covenants should be performed at different times. The application of the other rule is equally fatal to defendant's contention. In other words, the alleged agreement by the plaintiff to pay the special tax was *only a part* of the consideration for the contract sued on. We will have to rule this assignment against the defendant.

The following declaration of law indicates the opinion of the trial court on the other branch of the

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case: "The court sitting as a jury declares the law to be that the dismissal of the case number 67,534, in circuit court room number 3, of John R. Christian *v.* C. H. Sawyer, and the assignment of the causes of action therein sued on by said Christian to W. G. McCormick, was equivalent to a judgment for defendant C. H. Sawyer, within the meaning of the contract sued on, and entitled him to demand and have back from said Christian the four hundred dollars sued for in plaintiff's first cause of action."

We can find no fault with this instruction. The parties certainly contracted with reference to the final determination of the suit then pending. The plaintiff had the right under the contract to demand a trial of the cause, and, if the defendant saw proper to dismiss the action, or if he was compelled to this course by the action of the court in refusing him a continuance, it was his misfortune, and such action could in no way affect or postpone the right of plaintiff to the money deposited with him. If this construction of the writing is not adopted, and if the plaintiff's right of action for the four hundred dollars is made to depend upon a determination of plaintiff's liability to pay the demands now in suit in the case of McCormick *v.* Sawyer, there would be nothing to prevent McCormick, when pressed for trial, from taking a non-suit, and thus, by successive suits and non-suits, the defendant could postpone indefinitely the plaintiff's right of recovery. This disposes of the second defense, and our conclusion necessarily leads to an affirmance of the judgment.

The plaintiff's petition contained two counts. The court found for the defendant on the second count, and, as the plaintiff has filed no cross-appeal, it will not be necessary to discuss it.

The judgment of the circuit court will, therefore, be affirmed. All the judges concurring, it is so ordered.

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R. S. MacDonald, Respondent, v. Edward B. Wolff, Appellant.

St. Louis Court of Appeals, April 1, 1890.

1. **Tender:** WAIVER BY UNQUALIFIED REFUSAL. When a person, entitled to the transfer of a patent right as a condition to the liability sued for, absolutely and unqualifiedly refuses to accept such an assignment, and denies the liability, a formal tender of such assignment becomes unnecessary, and such liability may thereupon be enforced without such tender.

2. **Contracts.** When several instruments are executed at the same time in relation to the same subject-matter and to accomplish a common purpose, and the execution thereof is known to every party to either instrument, they should be construed as one contract, though the parties to each instrument are not the same.

3. **Practice, Appellate:** NON-PREJUDICIAL ERROR. Though there be error in that an instruction was given by the trial court, when there was no evidence to support it, the judgment appealed from will not be reversed, if the error was harmless.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Affirmed.

Frank Hicks, for the appellant.

M. Kinealy and *Jas. R. Kinealy*, for the respondent.

Biggs, J., delivered the opinion of the court.

The plaintiff brought suit against the defendant on the following written instrument:

"This agreement entered into between R. S. MacDonald and Edward B. Wolff witnesseth: That, whereas said MacDonald has this day signed an injunction bond in case of A. Loehner *v.* B. A. Hill *et al.*, and received from said Loehner an assignment of one-half interest in a certain patent car-coupling bearing date September 14, 1880, and numbered 232,195, to

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secure himself from loss on said bond, now, therefore, if said Loehner shall repay to said MacDonald any moneys which said MacDonald shall have paid on said bond within fifteen days after such payment, and take a reassignment of said interest in said patent to himself, then this assignment to be void; but if said MacDonald shall suffer loss as aforesaid, and shall not be repaid by said Loehner as aforesaid, then said Wolff obligates himself to repay to said MacDonald such moneys so paid out as aforesaid; and said MacDonald shall assign to the said E. B. Wolff the one-half interest in aforesaid patent, which is this day assigned from A. Loehner to R. S. MacDonald. Witness our hands and seals this tenth day of February, 1881.

"[Seal.] R. S. MACDONALD,
"[Seal.] EDW. B. WOLFF."

Plaintiff alleged the dissolution of the injunction; a judgment against him on the injunction bond for damages amounting to the sum of five hundred and fifty dollars, and also for costs of the proceeding, and the payment thereof by him. It was then averred that neither Loehner nor the defendant ever refunded to plaintiff the amount so paid by him, although he had demanded the same of the defendant prior to the institution of the suit; that the plaintiff, at the time of the demand, offered to assign to defendant the interest in the patent, which he (plaintiff) had acquired from Loehner, provided the defendant would refund to him the amount paid on account of the bond, but that the defendant failed to pay and refused to accept an assignment of the patent, alleging as a reason therefor that the invention was worthless.

The answer of the defendant was a general denial. The cause was submitted to the court without a jury, and the court rendered judgment for plaintiff for the sum of three hundred and forty-eight dollars and forty-nine cents. The defendant has brought the case to this court for review.

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On the trial the execution of the contract was not denied, and it is now conceded that there was a dissolution of the injunction in the case of Loehner *v.* Hill; that there was an assessment of damages, and that a judgment was rendered against the plaintiff as surety on the injunction bond for the amount of damages so assessed, to-wit: The sum of five hundred and fifty dollars, together with the costs. That the plaintiff satisfied that judgment is not controverted, but the defendant denied liability, and insisted that he was released from all obligations under the contracts upon two grounds:

First. That the plaintiff had never assigned or offered to assign to him the interest in the Loehner patent. *Second.* That, prior to the institution of this action, the plaintiff had transferred one-half of his interest in the patent to one Frank J. Bowman, thereby rendering it impossible for him to comply with his part of the contract.

The proper understanding of the defenses interposed necessitates a statement of the facts. It appears from the record that Frank J. Bowman and the defendant, who were both lawyers, represented Loehner in the injunction suit against Hill. Their compensation depended entirely on their success in the suit. Some difficulty was encountered by Loehner in procuring satisfactory sureties on his injunction bond, and one or two bonds presented by him were rejected by the court. Finally the defendant and Bowman applied to the plaintiff to become Loehner's surety, which he at first declined to do, but afterwards his consent was obtained, provided he was made perfectly secure. Thereupon the defendant prepared an agreement, which was signed by Loehner, by which Loehner transferred to plaintiff as an indemnity against loss an undivided one-half interest in a car-coupling patent, and it was stipulated in the writing that, if Loehner should fail for fifteen days to

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pay the plaintiff any amount which he might be required to pay as surety on the bond, then the plaintiff's title to the interest in the patent, so pledged, was to become absolute. The plaintiff deemed this security inadequate, and he declined to sign the bond; thereupon the defendant prepared and signed the contract sued on, and, as further security, the defendant prepared, and Bowman signed, the following contract:

"I, Frank J. Bowman, of the city of St. Louis, hereby agree to share half of any loss that R. S. MacDonald may suffer on account of said MacDonald having signed a bond for five thousand dollars for an injunction in the case of A. Loehner *v.* B. Hill, and in consideration therefor I am to be entitled to share with said MacDonald in any security which said MacDonald may hold to secure himself against loss. Witness my hand and seal, this tenth day of February, 1881.

"FRANK J. BOWMAN."

The plaintiff testified that the defendant delivered the three contracts to him on the day of their date, to-wit, February 10, 1881, and he then signed the injunction bond. The defendant admitted that he prepared and delivered the contracts to the plaintiff, but he said that *his* contract was not delivered until two or three days after the plaintiff had signed the bond. On the other hand the plaintiff was very positive that all the contracts were delivered to him on the tenth day of February, and, as all the papers are of that date, it may be assumed that he is right. However, the defendant's contention as to the date and delivery of his contract was not pressed in the circuit court, and no point is made on it in this court. The plaintiff paid the damages in the latter part of the year 1885, and a few days thereafter he demanded the amount thereof from the defendant. The plaintiff stated that, at the time he made the demand he offered to assign to defendant his

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interest in the patent, but that the latter declined to accept, stating as a reason that the invention was worthless and that he did not wish to be bothered with it. The defendant admitted the demand for the money, but denied that an assignment of the patent was offered. After this the plaintiff sued Bowman on his contract, but, before doing so, he delivered to Bowman the following paper:

"Know all men by these presents that I, R. S. MacDonald, for and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby convey to Frank J. Bowman a one-half interest in all the interest I now hold in certain letters patent issued by the United States government to one A. Loehner for a car-coupler, and dated September 14, 1880, and number 232,195, to have and to hold the same forever. Witness my hand and seal this thirteenth day of January, 1886.

"R. S. MacDonald."

The defendant collected from Bowman three hundred and fifty-seven dollars and fifty-seven cents. There was no evidence of the time for which the patent was issued, but this is immaterial, as the plaintiff's evidence, that the invention was entirely worthless, was in no way contradicted by the defendant. On the trial the plaintiff tendered to defendant an assignment of the patent.

It appears from the foregoing statement that the plaintiff did not make a formal tender of a written assignment of the patent at the time when he demanded of the defendant the performance of the contract, and he alleged as an excuse for such failure the unqualified refusal of the defendant to accept the assignment. It also appears that afterwards the plaintiff sued Bowman on his contract and collected from him one-half of the amount, but that the plaintiff, in order to maintain the

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action against Bowman, was compelled to assign to Bowman one-half of his interest in the patent. Under this state of the evidence the defendant among other instructions asked the following: "5. The court declares the law to be that, although the court may find from the evidence that plaintiff at some time prior to the institution of this suit stated to defendant that plaintiff was ready to assign to defendant the interest in the patent mentioned in the petition, on payment of the sums due to plaintiff under the instrument sued on, and that defendant at such time failed to make such payment and refused to receive such assignment, yet, if it appears that plaintiff afterwards sold and assigned a part of such interest in said patent to a third person, thereby rendering plaintiff unable to transfer to defendant all the interest therein mentioned in the instrument sued on, then plaintiff cannot recover in this action." The court refused the instruction as asked, but added the following: "Unless the court further find from the evidence that prior to the filing of this suit, and while plaintiff held said half interest in said patent, he proposed and offered to assign the same to defendant, and that he (defendant) declined and refused unconditionally and absolutely to accept such assignment, declaring said interest to be of no value and that he would not have it and did not want to be bothered with it; and if the court so find, and find for plaintiff in this case, and further find from the evidence that plaintiff assigned any part of said patent interest to a third party and realized any sum therefor, then the amount which he is entitled to recover must be reduced by such sum." There is another paragraph at the end of the court's instruction which is evidently incomplete. We presume that the court intended to make the plaintiff's right of recovery depend upon the further contingency of an offer before trial to convey to the defendant the remaining interest in the patent held by him.

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There were other instructions asked by defendant, but the one quoted presents in a very concise manner the legal proposition relied on by defendant, and its modification shows the theory upon which the court decided the case.

The law never requires a person to do a useless thing, and, applying this principle, we are of opinion that the absolute and unqualified refusal of defendant to accept the assignment relieved the plaintiff of the duty of making a formal tender of a written transfer. What good could have resulted from it? If the invention was worthless, it was quite reasonable for defendant to decline to be bothered with it. When the defendant refused to pay the money on demand and declined to receive an assignment of the patent interest then held by plaintiff, the latter's right of action against him became complete. *Canda v. Wick*, 1 Cent. Rep. 12; *Hall v. Ins. Co.*, 17 Atl. Rep. 356.

But it may be said that it was the plaintiff's duty to retain the patent, if he expected to hold the defendant to his engagement, and that, having parted with a portion of his interest, he had by this voluntary act placed it beyond his power to carry out his part of the contract, and that, therefore, his right of recovery would be defeated or at least confined to nominal damages. The trial court was of the opinion that, as the patent was regarded as entirely worthless and had in fact no value, the plaintiff had a right to make a reasonable disposition of it, and, having done so, the amount received by him would have to be deducted from the amount sued for. This view may be subject to some technical objections, but, under the view which we take of the law applicable to the conceded facts, it could work no prejudice to the defendant. We are of the opinion that the transfer of one-half of the patent interest to Bowman was not in violation of the contract between the plaintiff and defendant. The plaintiff's

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contracts with defendant and Bowman were of the same date; they related to the same subject-matter; had but a single object, and were substantially between the same parties. It is a well-recognized rule of law that a contract may be contained in several instruments, which, if made at the same time, between the same parties and in relation to the same subject-matter, will be held to constitute but one contract; and for the purpose of arriving at the true intention of the parties all the instruments will be read as one, and the recitals in each may be explained or limited by reference to the others; and it is not necessary that the instruments should in terms refer to each other. *Cornell v. Todd*, 2 Denio, 133; *Hanford v. Rogers*, 11 Barb. 20; *Hull v. Adams*, 1 Hill (N. Y.) 603; *Jackson v. McKenney*, 3 Wend. 233; *Stow v. Tifft*, 15 John. 463; *Gammon v. Freeman*, 31 Me. 243; *Clark v. Munroe*, 14 Mass. 351; *Gilliam v. Moore*, 4 Leigh. 30; 2 Parsons on Contracts [7 Ed.] 503. In the case of *Gammon v. Freeman*, *supra*, the supreme court of Maine held that, to make two or more instruments one transaction or contract, it was not necessary that the parties to each instrument should be the same; it was sufficient if the contracts were known to all the parties, and were delivered at the same time to accomplish an agreed purpose.

In the case at bar the defendant and Bowman, in the execution of the instruments, had a common purpose, and that was to induce the plaintiff to sign Loehner's bond and to secure him against loss on account thereof. The instruments bear the same date, and were signed by parties who were alike and equally interested in obtaining the plaintiff's signature to the bond, and the defendant had knowledge of the contents of all the instruments. From these facts it necessarily follows that plaintiff's contracts with the defendant and Bowman must be read together and treated as constituting but one contract. Therefore, it must be held that the

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defendant, in signing the instrument in suit, agreed to submit to the conditions of the Bowman contract; hence the plaintiff had a complete right, as against the defendant, to transfer to Bowman one-half of his interest in the patent, provided Bowman should pay plaintiff one-half of his demand.

One or two instructions given by the court are subject to criticism, and one was without evidence to support it; but, under our view of the case, the error was harmless. We think that the conclusion reached by the trial court was right, and its judgment will, therefore, be affirmed. All the judges concur.

PAULINE HUELS *et al.*, Respondents, v. CHARLES BOETTGER *et al.*, Appellants.

St. Louis Court of Appeals, April 1, 1890.

1. **Fraudulent Conveyances:** DELIVERY OF GOODS SOLD. If the acts of a purchaser of a stock of merchandise in taking and keeping possession of the property sold are open, notorious and visible, and such as to clearly and unequivocally indicate a complete delivery, his failure to take all the means having a tendency to impart notice of the sale will not invalidate the sale as to the creditors of the vendor. And *held*, in the case at bar, that a sale was not invalid as to the vendor's creditors, because the vendee failed to remove a curtain having the vendor's name on it, when his acts were otherwise sufficient to constitute an open and notorious change of possession.

2. **Estoppel.** When the owner of property, levied upon under a writ of attachment against a third person, is in the possession thereof at the time of the levy, and furthermore verbally notifies the attaching officer of his title, neither his giving a forthcoming bond and afterwards surrendering the property upon the order of the court issuing the writ, nor his failure to make a claim in writing for the property, will estop him from claiming the property after such surrender.

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Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Wm. S. Bodley, for the appellants.

1 The plaintiffs, having made, executed and delivered to the constable a forthcoming bond, when the property was levied on, as the property of J. H. Bueter, are estopped from claiming said property as their own in any proceeding. *McElfatrick v. Macauley*, 15 Mo. App. 102. (2) Plaintiffs, having given a forthcoming bond and not filing any written claim, duly sworn to according to law, with the officer, when the property was levied on, as the property of another, cannot be allowed to claim thereafter such property in any proceeding. *Mfg. Co. v. Bean*, 20 Mo. App. 111; *Mansur v. Hill*, 22 Mo. App. 372. (3) The sale from J. H. Bueter to plaintiffs was fraudulent in law, as to existing creditors and purchasers for value under section 2505, Revised Statutes, 1879. *Wright v. McCormick*, 67 Mo. 426, and cases there cited; followed in cases *Mills v. Thompson*, 72 Mo. 367; *State v. Cooper*, 79 Mo. 466; *Stewart v. Bergstrom*, 79 Mo. 525; *Franklin v. Gummersell*, 9 Mo. App. 90; *State v. Donnelly*, 9 Mo. App. 527; *Stern v. Henley*, 68 Mo. 262; *State to use v. Hellman*, 20 Mo. 304. The facts in cases of *Knoop v. Dist. Co.*, 26 Mo. App. 311, and *Leeser v. Boekhoff*, 33 Mo. App. 233, do not apply here.

Lubke & Muench, for the respondents

The sale in question was valid in law, and the change of possession sufficient under the statute. *Knoop v. Distilling Co.*, 26 Mo. App. 311; *Leeser v. Boekhoff*, 33 Mo. App. 223. Defendants are equally technical in

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their second contention, wherein they rely upon an alleged estoppel. It is not claimed here that the defendants were in the least misled by anything which was said or done by plaintiff. On the contrary, they admit that from the first they were notified of plaintiff's ownership and that a vigorous protest against the taking of her property was entered by her whenever she came in contact with the defendants or their claim. Some very general language in the case of *McElfatrick v. Macauley*, 15 Mo. App. 102, is relied upon to sustain their technical claim, and at the same time it is admitted that the later cases of *Mfg. Co. v. Bean*, 20 Mo. App. 111, and *Mansur v. Hill*, 22 Mo. App. 372, modify the language in the former decision, so as to discharge this case from the rule invoked in the *McElfatrick case*.

BIGGS, J., delivered the opinion of the court.

This is an action of replevin in which the ownership of a stock of groceries is involved. Pauline Huels claimed to have purchased the goods from one J. H. Bueter, and the defendant Charles Boettger claimed the right to retain them by virtue of a levy made by him as constable under a writ of attachment, in which his codefendants were plaintiffs and J. H. Bueter was the defendant. The case was submitted to the court on an agreed statement of facts; a judgment was entered for the plaintiffs, and the defendants have appealed.

It appears from the agreed statement of facts that on the sixth day of March, 1889, Pauline Huels purchased the goods in controversy from J. H. Bueter. She also purchased the fixtures belonging to, and used by, Bueter in conducting the business, together with a horse and delivery wagon. Mrs. Huels paid one thousand dollars for this property, and the defendants conceded that the purchase was made in good faith, but they contend that there was not such a delivery of the

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possession, prior to the date of the attachment, as the statute requires. On this subject, the parties agree that an invoice of the goods was taken at the time of the purchase; that, on the day after the purchase, Mrs. Huels and her son took the entire management and control of the goods sold; that Bueter left the premises and had nothing further, either directly or indirectly, to do with the business; that a new lease of the premises was immediately taken in Mrs. Huels' name; that, under the direction and management of the plaintiffs, various improvements and changes were made in and about the store room; that Mrs. Huels had purchased new goods of the value of eight hundred dollars, and had erased the name of Bueter from the delivery wagon, substituting her own in the place of it. On the other hand, it was admitted that the goods were, on the eighteenth day of March, 1889, seized by the defendant Boettger, under the writ of attachment, and that the plaintiffs had permitted a curtain to remain in one of the windows of the store with the words "J. H. Bueter, Fancy and Staple Groceries," printed thereon.

It was also agreed that, at the time of the levy, the plaintiffs were in the actual possession of the goods; that they protested against the levy, and claimed that the property had been purchased by Mrs. Huels. Notwithstanding this the levy was made, and Mrs. Huels gave a forthcoming bond to the constable. The attachment proceedings were sustained and judgment entered against Bueter. The plaintiffs were ordered by the justice to deliver the property to the constable; thereupon the plaintiffs brought this action under the statute relating to the claim and delivery of personal property.

The defendants challenge the validity of the judgment on three grounds: *First.* The purchase by plaintiffs from Bueter was, as to the creditors of Bueter, fraudulent and void. *Second.* By giving the forthcoming bond, the plaintiffs are estopped from denying

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that the attached property belonged to J. H. Bueter. *Third.* The plaintiffs, having failed to make a written claim to the property at the time of the levy, cannot now assert Mrs. Huels' title under the purchase.

I. The validity of the sale is questioned on the ground that there was not such a delivery of the possession of the goods as is required by the statute. This question has so often been the subject of judicial investigation that it is useless for us to quote the statute, or enter into a general discussion of its proper interpretation. We are of the opinion that the construction placed upon it by WAGNER, J., in *Claflin v. Rosenberg*, 42 Mo. 439, was a reasonable interpretation of its meaning, and that some of the subsequent decisions have had a tendency to mystify, rather than to throw additional light on, the meaning of the statute and its practical application. In the case cited the court made use of the following language: "There must be a complete change of the dominion and control over the property, and some act which will operate as a divesture of title and possession from the vendor, and a transference into the vendee. This necessarily excludes the idea of a joint or concurrent possession. It may not be essential or indispensable that the goods should be moved into a new or different house; but there must be some open, notorious or visible act, clearly and unequivocally indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place." When we apply the foregoing rules of construction to the conceded facts in this case, we must hold that the delivery of the possession of the goods to Mrs. Huels by Bueter was sufficient to satisfy the statute. There was an entire change in the management of the business; Bueter left the premises and had no further control of the goods; the store room was changed in many particulars; Mrs. Huels

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purchased additional goods of the value of eight hundred dollars; the name on the delivery wagon was erased, and that of Mrs. Huels substituted, and there was nothing left to indicate that Bueter had ever owned the store, except his name on a curtain which Mrs. Huels had neglected to take down. The means adopted by Mrs. Huels and Bueter to accomplish a complete and permanent change of possession of the store were certainly sufficient to impart notice of that fact to the community and to persons having dealings at the store. Such a result satisfies the statute. In other words, it is not necessary for a purchaser to take all the means which would have a tendency to impart notice, but some open, notorious, and visible act or acts clearly and unequivocally indicating a complete delivery will sustain the finding of a trial court in favor of the sufficiency of the delivery. In the case at bar the agreed statement shows several such acts, and, in fact, everything indicated a complete and absolute change of possession and ownership, except the sign on the curtain. We will not disturb the finding of the circuit court on this fact al one, and thus deprive Mrs. Huels of the benefit of her purchase, which, in other respects, was indisputably valid and in good faith.

II. The defendants' second and third objections may be considered together. In both the doctrine of estoppel is invoked. In the first place the defendants insist that the fact that the plaintiffs gave a forthcoming bond is sufficient to estop them from asserting title to the goods. There is no warrant in law for such a doctrine. There can be no estoppel on account of the bond, unless it contains recitals tending to show that the property seized was admitted by the plaintiffs to be the property of Bueter. If such were the case, then the plaintiffs would be estopped by the terms of their bond. But there is nothing in the bond that can be tortured into such an admission; therefore, the question of

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estoppel on account of the bond is eliminated from the case.

Lastly it is urged that a failure by plaintiffs to make a written claim to the property at the time of the levy ought to estop Mrs. Huels from denying Bueter's ownership of the goods at the time of the seizure. It is conceded that Mrs. Huels protested against the levy, and verbally notified the constable that the goods belonged to her and that Bueter had no interest in them; but it is urged that this was not sufficient, and that, under such circumstances, the plaintiffs ought to have filed with the constable a written claim, and, having failed to do so, they ought now to be estopped from asserting such claim. In support of this position the defendants rely on the case of *McElfatrick v. Macauley*, 15 Mo. App. 102, In that case a cashier's check was levied on in the hands of Fletcher, the interpleader, as the property of Macauley, the defendant in the attachment. Fletcher, without making any claim to the check at the time of the levy, gave a forthcoming bond, and, after the attachment had been sustained and judgment rendered against Macauley, and an execution returned *nulla bona*, he delivered the check into court and sought to enforce his claim to it by an interplea. The court held that he would not be permitted to assert a claim to the check, and the main reason for the ruling is to be found in the following paragraph of the opinion: "After levying his attachment upon property which is *apparently* that of his debtor, the sheriff taking a bond for the forthcoming of the property when ordered by the court, he (plaintiff) is entitled to consider his debt secure, and to relax his efforts. If his debtor have other property, he may get it beyond the reach of process; and if, after the attachment suit was entirely ended, the principal in the forthcoming bond can come into court and say: Although I gave bond for the forthcoming of this property when ordered by the court, and

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although I stood by and allowed the attachment suit to ripen into judgment, and allowed an execution to issue and be returned *nulla bona*, and allowed an order to be made requiring me to return the property according to the condition of the forthcoming bond; yet I am, nevertheless, entitled now to assert for the *first time*, that it was and is my property, and not subject to the attachment; if this can be done, a great wrong may be perpetrated upon an attaching creditor under the sanction of legal forms." The statement of the foregoing facts readily suggests reasonable grounds for an estoppel *in pais*, but the facts in the case under consideration are essentially different. In the *McElfatrick case*, the court said that *apparently* the check was the property of Macauley, the defendant in the attachment, and from this we have the right to conclude that the check was drawn in his favor, although this is not stated as a fact in the opinion. In the present case plaintiffs were in the actual possession of the property at the time of the levy, and, therefore, they were *prima facie* the true owners. They did nothing to create an estoppel; they asserted title in Mrs. Heuls before, and at the time of, the levy. Under such circumstances how can it be maintained that the plaintiffs in the attachment were lulled into security, and ceased their efforts to find other property belonging to Bueter on account of anything said or done by the plaintiffs, or either of them? The evidence in this case does not establish a single element of an estoppel *in pais* against the plaintiffs, and we will, therefore, rule this assignment likewise against the defendants. *Bradley-Hubbard Mfg. Co. v. Bean*, 20 Mo. App. 111; *Mansur v. Hill*, 22 Mo. App. 372.

As we find no error in the record the judgment of the circuit court will be affirmed. All the judges concur.

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E. J. EGGMANN, Assignee of PARAGON AWNING AND MANUFACTURING COMPANY, Respondent, v. D. J. BLANKE, Appellant.

St. Louis Court of Appeals, April 1, 1890.

Corporations. Law of the state of Illinois considered and *held* that, under it, a corporation has the right to acquire shares of its own capital stock.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

S. S. Merrill, for the appellant.

(1) At the date of these notes and the issue of the five hundred shares to the defendant all the stock of the corporation belonged to the subscribers in the articles of incorporation, and such issue was an over-issue of stock and therefore void. The subscription makes one a stockholder, and it is not necessary to have a certificate. *Schaeffer v. H. I. Co.*, 46 Mo. 248; 1 Waterman on Corp. 168, sec. 48; Cook on Stock & Stockh. [1 Ed.] 12, sec. 10; *Haskell v. Sells*, 14 Mo. App. 91. Moreover an over-issue of stock is void. Cook on Stock & Stockh. [1 Ed.] sec. 291; *Scovill v. Thayer*, 105 U. S. 143; *H. I. Co. v. Kamper*, 73 Ala. 325; *Clark v. Turner*, 73 Ga. 1; *Lathrop v. Kneeland*, 46 Barb. 432; *Page v. Austin*, 10 Can. Sup. Ct. 132; *People v. Sterling B. C. M. Co.*, 82 Ill. 457; *Works v. Mfg. Co.*, 139 Mass. 5; *Bank v. Railroad*, 13 N. Y. 599; *Railroad v. Schuyler*, 34 N. Y. 30. (2) The only claim, that the company had any stock at that time, is the contract (Exhibit D) of February 14, 1887, made by Smith as president of

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both companies, and attested by the secretaries of both, selling the assets of one for stock in the other, part of which stock the new company could sell for its own benefit. Neither the president of a company nor its secretary has power, as such, to make such a contract for the company. *Hyde v. Larkin*, 35 Mo. App. 366; *Bacon v. I. Co.*, 31 Miss. 116; 1 Waterman on Corp. [1 Ed.] sec. 126. The contract, moreover, could not bind the corporation, when it was made, since the corporation was not then in existence. Nor could the corporation ratify the contract, since the contract was void and not voidable. *Ashbury v. Riche*, L. R. 7 H. L. 653; *Taymouth v. Koehler*, 35 Mich. 22; 2 Waterman Corp. [1 Ed.] sec. 269; 1 Story Cont. [5 Ed.] sec. 244; *National T. Co. v. Miller*, 33 N. J. Eq. 155; *Thomas v. Railroad*, 101 U. S. 71; *Downing v. Railroad*, 40 N. H. 230; *In re London N. J. Co.*, L. R. 4 Ch. App. 682; *Alexander v. Nelson*, 42 Ala. 462; *McCullough v. Moss*, 5 Denio, 567; *Carnes v. Polk*, 4 Coldw. 87. In such a case there can be no estoppel. *Works v. Mfg. Co.*, 139 Mass. 5; *In re Comstock*, 3 Sawy. 218; *Scovill v. Thayer*, 105 U. S. 143; *Langan v. Sankey*, 55 Iowa, 52; *Martin v. Zellerbach*, 38 Cal. 300; *Mattox v. Hightshue*, 39 Ind. 95.

H. D. Wood, for the respondent.

The contention that the stock for which the notes sued upon were given is over-issued stock is erroneous, both as a matter of law and as a matter of fact. The stubs in the stock book show that of the fifty thousand shares authorized capital only twenty thousand, six hundred and fifty-two shares have been issued. There could be no over-issued stock until the whole fifty thousand shares were issued. The title to unissued stock remains in the company. *Chetlain v. Ins. Co.*, 86 Ill. 225, 220. This is an Illinois corporation. In

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Illinois a corporation may own its own stock and violate no duty to stockholders. *Chetlain v. Ins. Co.*, 86 Ill. 225, 220. The contract to purchase the stock inured to the benefit of the company after it completed its organization. *Griswolk v. Trustees*, 26 Ill. 41.

Biggs, J., delivered the opinion of the court.

The plaintiff is the assignee of the Paragon Awning and Manufacturing Company, a business corporation organized under the laws of the state of Illinois, and as such assignee he instituted this action against the defendant on several promissory notes, executed by the defendant, and made payable to that company. In the body of each note is the following statement: "The same being a payment of five per cent. on my purchase of five hundred shares of stock of the Paragon Awning and Manufacturing Company, which is held by them as collateral security for the payment of this note."

The defense was that the stock issued to the defendant by the awning company was an over-issue of its capital stock, and that, for this reason, the notes given by him in part payment thereof were without consideration. The cause was submitted to the court, and judgment was entered against defendant for the full amount of the notes. From this judgment the defendant has prosecuted an appeal.

There is no dispute about the facts, and they may be stated as follows: On the twenty-second day of January, 1887, the defendant, Henry W. Smith, E. C. Newkirk, and others were stockholders in the Paragon Awning Company, another Illinois corporation. Charles L. and H. S. LaBarge were the owners of certain patents or inventions, which, at that date, were supposed to be very valuable. An agreement was entered into between Charles L. LaBarge on the one side, and Henry W. Smith and other stockholders of the last-named company on the other, in which it was agreed to

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form a new corporation, to be known as the Paragon Awning and Manufacturing Company, with an authorized capital stock of fifty thousand shares of the par value of ten dollars each. This stock was to be divided as follows: Ten thousand shares were to be subscribed for by Charles L. and H. S. LaBarge, to be paid for by an assignment of their patents to the new corporation, and the remaining shares were to be subscribed for by Henry W. Smith and E. C. Newkirk. The shares so subscribed by Smith and Newkirk were to be paid for by transferring to the proposed company all the assets of the old company, and the shares so subscribed were to be divided among the stockholders of the old corporation in the proportion in which they held the shares of the old company; except ten thousand shares, which were to be held by Smith as trustee, and to be sold under the direction of the directors of the new company for the purpose of creating a working capital. The stock of the new company was subscribed pursuant to this plan, and, on the twelfth day of February, 1887, the secretary of state of Illinois issued a certificate of incorporation under the name of the "Paragon Awning and Manufacturing Company." Prior to the incorporation of the new company, but in contemplation thereof, to-wit, on the eighth day of February, 1887, the defendant together with various other parties signed an agreement, by which they agreed to purchase of the new company the entire ten thousand shares, set apart as a working capital, at one dollar per share. The defendant subscribed for five hundred shares. On the twelfth day of February, the defendant was elected a director of the new company. On the fourteenth day of February the sale of the assets of the old company was ratified by its stockholders. On the sixteenth day of February, the defendant was elected vice-president of the new corporation. On the eighteenth day of February the defendant executed the note sued on, and

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on the twenty-fourth day of March the sale of the ten thousand shares of stock at one dollar per share was ratified by the Paragon Awning and Manufacturing Company. On the sixth day of May, 1887, the defendant was present at a directors' meeting and a statement of the delinquent purchasers of this trust stock was read, and he urged the enforcement of the subscriptions. In addition to this, the defendant issued a prospectus, in which he set forth the bright prospects of the new corporation, stating, among other things, that ten thousand shares of capital stock had been reserved by the company, and would be sold at one dollar per share, in order to raise funds to prosecute the business, and that he had purchased five hundred shares of this stock.

The objection made by defendant's counsel, that the stock issued to defendant was an over-issue by the Paragon Awning and Manufacturing Company, is, in our opinion, untenable. The determination of this question, however, does not necessarily fix the defendant's liability, but it is made to depend upon the validity or legality of the agreements leading up to the incorporation of the company. It is true, as claimed by defendant, that the law of Illinois requires the entire capital stock of a proposed corporation to be subscribed, but we are of the opinion that this law was strictly complied with in the incorporation of the Paragon Awning and Manufacturing Company. The organization of this corporation was, in effect, a re-organization of the Paragon Awning Company, and the object was to increase the capital stock, and secure control of the inventions belonging to Charles L. and H. S. LaBarge. To accomplish this an agreement was entered into by LaBarge on the one side, and Henry W. Smith and E. C. Newkirk, representing the old corporation, on the other, by which LaBarge was to subscribe for ten thousand shares of the new corporation, and Smith and Newkirk were to subscribe for the remainder, to-wit,

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forty thousand shares to be held for the benefit of the stockholders of the old company. LaBarge was to pay for his stock by transferring to the company the patents or inventions, and Smith and Newkirk were to pay for the trust stock by transferring to the new company all the assets of the old. But, for the purpose of securing a fund to prosecute the business of the proposed corporation, it was agreed that ten thousand shares of the stock, which was subscribed by Smith for the benefit of the stockholders, should be turned over to the new company to be sold by it for the benefit of all parties concerned. The practical effect of this arrangement was to donate to the new corporation ten thousand shares of its own stock, but, as we have shown, the stock had been *bona fide* subscribed, and paid for in a manner not subject to challenge by this defendant. The stock purchased by defendant was a portion of the ten thousand shares, and this disposes of his contention that the stock delivered to him was, as a matter of fact, an over-issue.

However, as before stated, the defendant's liability does not depend solely upon this question, but the question still remains whether such an agreement, when ratified by the stockholders of the old company and carried out by delivery of the stock to the new company, was repugnant to the laws of the state of Illinois. Our examination of the Illinois decisions has led us to the opinion that this contract or arrangement was not *ultra vires* under the law of that state. There are numerous cases of the supreme court of that state, which hold that a corporation may purchase its own stock, and violate no duty to its own stockholders. *Chetlain v. Ins. Co.*, 86 Ill. 220; *Chicago, etc., Railroad Co. v. President*, 84 Ill. 145. In the *Chetlain case* the court held that if A. subscribed for ten shares of the capital stock of a corporation, and, having paid two hundred dollars, was willing to receive a certificate

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for two shares of one hundred dollars each and cancel his subscription for the ten shares, this could be done, and that the other eight shares would belong to the company, and that it had a right to sell them to whom it pleased. The doctrine of this case would indicate that the agreement to donate the ten thousand shares was valid, and, when ratified by the stockholders of the old company, it vested in the new corporation the title to the stock, and the company had the right to sell it to whom it pleased.

Prior to the incorporation of the company, but, in contemplation of it, and for the purpose of carrying out the plan devised for the sale of the ten thousand shares, the defendant and others signed a paper in which they agreed to purchase the entire ten thousand shares at the price of one dollar per share. This agreement to purchase inured to the benefit of the new company after it completed its organization. *Griswolk v. Trustees*, 26 Ill. 41. The defendant agreed to buy five hundred of the shares, and this contract of purchase was subsequently carried out by him by the execution of the notes sued on.

There is no principle of law known to us, which would release the defendant from his liability to pay these notes. No question of fraud or misrepresentation is urged; in fact the record shows that the plan of incorporation, and especially the plan adopted for the sale of the stock was devised by the defendant himself. He was an officer and director of the corporation and took an active part in the management of its business, and he is, therefore, in no position to claim that he was over-reached or in any way deceived in the purchase of the stock or in the execution of the notes.

As we find no error in the record, the judgment of the circuit court will be affirmed. All the judges concurring, it is so ordered.

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THE STATE OF MISSOURI, Appellant, v. ALFRED P. COUCH AND JOHN M. FRANKS, Respondents.

St. Louis Court of Appeals, April 1, 1890.

Criminal Law: INDICTMENT. An indictment against judges of a county court for illegally exacting and collecting mileage *held* too indefinite, owing to the absence of any specification of the fees claimed to have been illegally exacted and collected.

Appeal from the Oregon Circuit Court.—HON. J. F. HALE, Judge.

AFFIRMED.

T. J. Braswell, Prosecuting Attorney, for the appellant.

Evans, Clarke & Smith, for the respondents.

BIGGS, J., delivered the opinion of the court.

The defendants are the judges of the county court of Oregon county, and the following indictment was returned against them: "The grand jurors for the state of Missouri, empaneled, sworn and charged to inquire within and for the body of the county of Oregon and state aforesaid, upon their oaths present that Alfred P. Couch and John M. Franks on the second day of October, 1888, at and in the county and state aforesaid, being then and there judges of the county court within and for the county of Oregon, and state of Missouri, in their official capacity, did then and there under color of their office as such judges, as aforesaid unlawfully and wilfully exact, demand and receive fees more than was due, and for the purpose of extortion

illegally issued an order and caused the same to be entered of record allowing said judges as aforesaid mileage at the special term of the county court held in the town of Alton on the second day of October, 1888, against the peace and dignity of the state.''

The court on motion of the defendants quashed the indictment because: *First.* The matters set forth therein constituted no offense. *Second.* Because the indictment was uncertain and indefinite.

We think the conclusion reached by the trial judge was correct. The indictment charged that the defendants, as judges of the county court, demanded and received fees that were not allowed by law, but it failed to state *what* fees were so received. The indictment continues with the additional charge that the defendants allowed themselves mileage, and that, at a special term of the county court, they caused an order to that effect to be entered of record. There is no averment upon what account or for what purpose the mileage was claimed, and there is nothing in the statute making it a misdemeanor for county judges at a special term to audit and allow fees.

It may be that the prosecuting attorney intended to so frame the indictment as to charge the defendants with exacting and collecting mileage for their attendance as judges at a special term of their court, but the pleading will bear no such interpretation.

The amendment of section 1215 of the Revised Statutes of 1879, by the legislature (Sess. Acts, 1883, page 73) left the question of the right of a county judge to mileage for attendance at a special term involved in some doubt, but, as the question is not presented by the record, we need not discuss it.

The judgment of the circuit court will be affirmed. All the judges concur.

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THE STATE OF MISSOURI, Appellant, v. J. T. UMPHREY, Respondent.

St. Louis Court of Appeals, April 1, 1890.

Criminal Law: PRESCRIPTION OF INTOXICATING LIQUORS BY PHYSICIAN. **An indictment, charging a physician with having criminally prescribed intoxicating liquors contrary to the statute (R. S. 1879, sec. 5476), is insufficient, if it does not charge that the physician issued the prescription for the purpose of enabling the liquor to be obtained and used otherwise than for medicinal purposes; a charge that the liquor was used not for medicinal purposes, but as a beverage, will not suffice.**

Appeal from the Pulaski Circuit Court.—HON. C. C. BLAND, Judge.

AFFIRMED.

J. L. Johnson, Prosecuting Attorney, for the appellant.

It is not necessary to follow the exact language of the statute creating the offense when words of equivalent import are used. *State v. Williamson*, 21 Mo. 496; *State v. Dengolensky*, 82 Mo. 44. The indictment charges that the defendant issued the prescription for intoxicating liquor to be used and drank as a beverage and is sufficient. That part of the indictment alleging that said liquor was used otherwise than for medicinal purposes can be stricken out as surplusage and still enough remains to constitute a valid indictment. *State v. Nations*, 75 Mo. 53; 39 Mo. 532.

Hill & Rackliff, for the respondent.

BIGGS, J., delivered the opinion of the court.

The following indictment was found against the defendant at the March term, 1889, of the circuit court

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of Pulaski county, to-wit: "The grand jurors for the state of Missouri summoned from the body of Pulaski county, impaneled, charged and sworn, upon their oaths present that J. T. Umphrey, late of the county aforesaid, on the second day of February, 1889, at the county of Pulaski, state aforesaid, then and there being a physician, did unlawfully make out and issue a prescription to one Sol. Douner for a certain quantity of intoxicating liquors, to-wit, one pint of alcohol, one-half pint of whiskey, one pint of brandy and one glass of beer, which said intoxicating liquors were then and there used otherwise than for medicinal purposes, to-wit, to be used and drank as a beverage, against the peace and dignity of the state."

This indictment was drawn under section 5476 of the Revised Statutes, 1879, which is as follows: "Any physician, or pretended physician, who shall make or issue any prescription to any person for intoxicating liquors, in any quantity, or for any compound of which such liquors shall form a part, to be used otherwise than for medicinal purposes, or who shall make or issue any prescription contrary to the true intent and meaning of this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by a fine of not less than forty nor more than two hundred dollars."

The defendant filed a motion to quash the indictment for the following reasons: *First.* Because it charges no offense against him. *Second.* Because said indictment fails to charge that he was a registered or legally practicing physician. *Third.* Because it does not charge in the language of the statute the purposes for which the prescription was given. *Fourth.* Because said indictment fails to set out the prescription or to show it was in legal form. The court sustained the motion and quashed the indictment, and from this judgment the state has appealed.

The general rule is that an indictment is sufficient, if it charges the offense in the language of the statute

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or in words of equivalent import. The indictment in this case fails to do either; the very *gravamen* or gist of the offense is omitted. It only charges that the intoxicants obtained on the alleged prescription were *used* as a beverage; whereas the defendant could only be held for a violation of the statute, if it was alleged and proved that he issued the prescription for the *purpose* of enabling the party to obtain the liquor to be used as a beverage. The language employed in the statute will admit of no other construction, and besides any other interpretation would be unreasonable. If a physician in good faith prescribes intoxicating liquors for his patient, and the intoxicants, thus obtained for medical purposes, are actually used as a beverage, it would be unjust to hold that this would amount to a violation of law by the physician. The indictment in controversy presents such a case, and we are of opinion that the circuit court did right in sustaining the motion to quash. The judgment will be affirmed. All the judges concur.

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ISABELLA NULL *et al.*, Appellants, v. JOHN W. HOWELL, Respondent.

St. Louis Court of Appeals, April 1, 1890.

Jurisdiction, Appellate. When the question is doubtful or fairly debatable, whether the supreme court or this court has jurisdiction of an appeal, and the appeal is taken to this court, the cause will be transferred to the supreme court. *Held*, accordingly, that the case at bar, which was an action for the admeasurement of dower, should be thus transferred.

Appeal from the Lincoln Circuit Court.—HON. E. M. HUGHES, Judge.

TRANSFERRED TO THE SUPREME COURT.

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W. H. Kennan, for the appellants.

Martin & Avery, for the respondent.

BIGGS, J., delivered the opinion of the court.

This is an action for the admeasurement of dower. The plaintiff, Isabella Null, claims a dower interest in the undivided one-half of certain real estate in the possession of the defendant. The plaintiff alleged that the lands belonged to the defendant and her former husband, J. Y. Howell, deceased, as tenants in common, and that her said husband died seized of an estate of inheritance in the undivided half interest therein. The defendant denied the plaintiff's right.

Under the provisions of the state constitution, establishing this court (section twelve, article six, Missouri State Constitution, and the subsequent amendments thereto), we are prohibited from exercising appellate jurisdiction "in cases involving title to real estate." It is sometimes a matter of difficulty to make a practical application of the constitutional inhibition. This court and the supreme court have ruled that cases "involving the title to real estate within the meaning of the constitution must be such where the *title* itself is the subject-matter of litigation, and that it is not sufficient that the title may be indirectly affected or that some interest growing out of the ownership of real estate is involved. *Robertson v. Railroad*, 18 Mo. App. 185; *State v. Court of Appeals*, 67 Mo. 200. To which class must the present action be assigned? Concerning this we entertain some doubt. We have adopted the rule that, when the question of our jurisdiction is doubtful or fairly debatable, we will transfer the cause to the supreme court, rather than run the risk of making a void judgment. We will, therefore, transfer this case under the provisions of the act of March 18, 1885. Missouri Session Acts, 1885, p. 121. All the judges concur.

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E. J. MALONE, Appellant, v. JAMES A. HOPKINS, Respondent.

St. Louis Court of Appeals, April 1, 1890.

Justices of the Peace: JURISDICTION. In an action of replevin the averment in the statement filed by the plaintiff, of the value of the property sued for, and of the damages for its detention and for injuries to it, conclusively determines the jurisdiction of the justice, and a dismissal of such an action for want of jurisdiction is not warranted by the fact that the plaintiff, in open court, testified to a value in excess of the justice's jurisdiction.

Appeal from the Scott Circuit Court.—HON H. C. O'BRYAN, Judge.

REVERSED AND REMANDED.

Geo. N. Boughton, for the appellant.

The statement filed with the justice fixes the value at one hundred and fifty dollars, and that settles the question of jurisdiction. R. S. 1879, sec. 2895; *Gottschalk v. Klinger*, 33 Mo. App. 410.

BIGGS, J., delivered the opinion of the court.

The plaintiff instituted this action before a justice of the peace for the recovery of the possession of certain personal property. He alleged in his complaint that the value of the property sought to be replevined was one hundred dollars. The damages for the taking and detention were stated to be twenty-five dollars. There was a judgment for the defendant before the justice, and the plaintiff appealed to the circuit court.

The cause coming on for trial in the circuit court, the plaintiff introduced testimony tending to prove his right to the possession of the property, its detention by the defendant, and its value. The plaintiff testified that the property was worth one hundred and seventy-five dollars, and, thereupon, the court, on its own

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motion, dismissed the proceeding for the reason that the value placed upon the property by the plaintiff exceeded the jurisdiction of the justice. The plaintiff has brought the case to this court for review, and the foregoing ruling of the court presents the only question for our determination.

Section 6168, Revised Statutes, 1889, provides that justices of the peace in counties of less than fifty thousand inhabitants shall have jurisdiction in actions of replevin in all cases where the value of the property sought to be recovered, and the damages claimed for the taking or detention, and for injuries thereto, shall not exceed in the aggregate one hundred and fifty dollars. Section 6182 reads as follows: "The value of the property, as set forth in the statement and affidavit, shall fix the jurisdiction of the justice so far as the value is concerned; but the value of the property shall not be assessed against the defendant at a greater amount than that sworn to by the plaintiff in his statement."

The value of the property, as fixed in the complaint and affidavit, was one hundred dollars, and the damages claimed were twenty-five dollars. This brought the case within the jurisdiction of the justice, and it made no difference that the evidence showed that the property was of greater value, because the plaintiff's recovery was limited by the above statute to the amount claimed in his affidavit. In the cases of *Gottschalk v. Klinger*, 33 Mo. App. 410, and *Payne v. Weems*, 36 Mo. App. 54, this court decided that the value of the property, as fixed by the statement and affidavit in a replevin suit, is conclusive as to the jurisdiction of the justice. These cases are decisive of the question in judgment in the case at bar, and necessarily lead to a reversal. The judgment of the circuit court will, therefore, be reversed and the cause remanded. All the judges concur.

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D. R. GRAHAM, Executor of LEWELLEN, Respondent, v. J. C. MORSTADT, Appellant.

St. Louis Court of Appeals, April 1, 1890.

1. **Bank Checks: LACHES IN PRESENTATION. The drawer of a check is not discharged by the laches of the holder in presenting it for payment, unless he is injured by such laches; and, if injured by such laches, he is released from liability only to the extent of such injury.**

2. **Practice, Trial: OMISSION TO FILE INSTRUMENT SUED ON. On the failure of the plaintiff to file an instrument of writing sued on, the defendant may move for the dismissal of the cause, but such failure is not ground for the exclusion of the writing, when offered in evidence at the trial.**

Appeal from the Montgomery Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

Emil Rosenberger, for the appellant.

Thomas J. Powell and *Thomas R. Harris*, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

The settlement of the real controversy in this action depends on very simple propositions of law, there being no substantial controversy about the facts, which are as follows: The defendant, being indebted to the plaintiff upon a promissory note in the sum of ninety-five dollars and fifty-five cents, gave to him, on July 17, 1887, his check for that amount on the Fifth National Bank in St. Louis, where the defendant kept an account. The plaintiff had confidence in the defendant, and in the bank, and took the check in payment of the note, surrendering the note. The bank, at that date, was solvent, and so continued until November, 1887, when it failed;

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and, if the check had been presented within a reasonable time, it would have been paid, regardless of the state of the defendant's balance in the bank. The check was not presented for payment until February, 1888, the bank being then closed and in the hands of a receiver, under the national banking act; it was then dishonored, and the defendant notified of its dishonor. *At the date of the failure of the bank the defendant had ten cents to his credit in the bank.* The defendant did not know of the presentation of the check within a reasonable time, and first learned of it in February, 1888, when the plaintiff presented it to him, demanded payment, and, payment being refused, instituted the present action.

The plaintiff's petition contained two counts, one upon the original note, and the other upon the check. The first count may be laid out of view, because it states no cause of action. It admits that the check was taken in payment of the note, and the note surrendered; hence the plaintiff's action, if any, was upon the check. The defendant answered, setting up the facts of the non-presentment of the check until February, 1888, after the bank had failed, and claiming that he was damaged thereby in the sum of two hundred dollars, and praying judgment. The cause was tried by the court without a jury, and judgment rendered in favor of the plaintiff for one hundred and one dollars and ninety-five cents, which amount, as a computation thereof shows, is equal to the face of the check with interest thereon from the date of the institution of the suit at the rate of six per centum per annum.

The errors assigned are that the court excluded proper evidence offered by the defendant, and erred in its declarations of law

The evidence offered by the defendant, and excluded by the court, was evidence tending to show that, if the plaintiff had made timely presentation of the check, the defendant would have sold one or more of his shares

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in the Fifth National Bank, then of the value of one hundred dollars or more, to make good any overdraft at the bank, which might have been created by the payment of the check, but that, owing to such non-presentation, he failed to sell the shares, still holds them, and, they having become wholly worthless, he is subject as their holder to suit by the receiver under the national banking act to make up delinquencies of the bank to its depositors. The court excluded evidence of such damage, as too remote and purely speculative, and this ruling was clearly correct.

As there is no controversy of facts, instructions or declarations of law had no office to perform, and hence we need not examine declarations given or refused. It being admitted that the check was given for value, the defendant was a principal promisor and was not discharged by any laches of the holder in not making due presentment thereof, unless he had suffered loss and injury in consequence, and then only *pro tanto*. *Morrison v. McCartney*, 30 Mo. 183, overruling *St. John v. Homans*, 8 Mo. 382. Here it is shown that the defendant drawer of the check had ten cents to his credit in the bank when it failed; to that extent he was entitled to credit. On the other hand the judgment of the court was only for the amount of the check with interest from the date of the institution of the suit, whereas plaintiff, under the conceded facts, was entitled to interest from the date of demand in February, 1888, and the interest between date of demand and date of the institution of the suit was for more than ten cents; hence the defendant has no reason to complain even on that score.

The check was not filed with the petition, but was produced upon the trial. When offered in evidence, it was objected to on the ground that it had not been filed. The statute requires that, when a suit is brought upon an instrument of writing, executed by the adverse party, and not lost or destroyed, it must be filed with

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the petition. The defendant might have availed himself of this omission by motion to dismiss, even after answer filed (*Rothwell v. Morgan*, 37 Mo. 107), or might have compelled the filing of the check, when produced upon the trial, but he could not take advantage of the omission by objecting to the check as evidence, as it was clearly competent evidence.

There is no error in the record, and, with the concurrence of all the judges, the judgment is affirmed.

C. A. STOTTS, by next Friend, Respondent, v. P. J. LEONHARD, Appellant.

St. Louis Court of Appeals, April 1, 1890.

Infant: DISAFFIRMANCE OF CONTRACT. An infant who purchases a chattel, and, to secure the payment of the purchase money, gives a mortgage on such chattel and other personal property of his own, may, if the vendor under the mortgage takes possession of the chattel sold and is thus placed *in statu quo*, disaffirm the mortgage, and thus release the additional property covered by it; and an action of replevin for such additional property, instituted by him, but dismissed without being prosecuted to a final judgment, is a sufficient disaffirmance.

Appeal from the Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

W. Cloud, for the appellant.

R. H. Landrum and *Wm. B. Skinner* for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action of replevin for a horse, and the following facts are conceded by the testimony: The plaintiff, who was a minor, in June, 1888, bought a buggy from the defendant, who at that time knew that plaintiff was a minor. The plaintiff paid nothing on

account, but gave to defendant his promissory note for eighty-five dollars, which was the purchase price, such note by its terms being payable February 1, 1889, and secured by a chattel mortgage executed by the plaintiff, conveying the buggy and the horse in controversy to defendant, with power to take possession and sell for condition broken. When this note fell due, the plaintiff tried to secure an extension, but failed. In March, 1889, the defendant sent a constable to take possession under the mortgage, and the plaintiff delivered the horse to him, stating that he was willing to turn it over in payment of the debt. The defendant refused so to receive the horse, but retained it, and subsequently retook the buggy also, whereupon the plaintiff instituted an action of replevin for the horse before a justice, but dismissed it before the institution of the present suit. The defendant gave a delivery bond in both actions. Upon trial in the circuit court, of the present action, by the court without a jury, the plaintiff recovered judgment for possession of the horse, or its ascertained value, and three dollars' damages.

The only substantial controversy arising on this appeal is, whether there was any evidence of the disaffirmance of the contract by the plaintiff prior to the institution of this suit. On that subject the plaintiff's father testified that, several days before the institution of the suit, he called upon the defendant and told him "that the intention was that the boy was not going to stand to the mortgage," but whether this was done at plaintiff's request or not did not clearly appear. The plaintiff himself testified on the subject as follows:

"*Q*. I mean have you ever claimed that this was not a legal debt because you were under twenty-one years of age? *A*. No, sir.

"*Q*. You never have gone to Leonhard and told him you wanted to repudiate the transaction or to rescind it, have you? *A*. No, sir.

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"*Q.* You have never asked him to take the buggy back and release you from the transaction, have you? *A.* No, sir.

"*Q.* You sent the horse then to pay off this debt, did you? *A.* Yes, sir.

"*Q.* Not for the purpose of rescinding the contract, but to pay off the debt? *A.* I sent the horse there to pay the debt.

"*Q.* You never claimed at any time that you were not going to pay that debt? *A.* No, sir.

"*Q.* You at all times have claimed you were going to pay it, haven't you? *A.* That is the way I stated it."

The view upon which the court's finding is based will best appear from the following declaration of law given on its own motion: "The court declares the law to be that, if the horse belonged to plaintiff, who was and still is a minor, and, if before bringing this suit, plaintiff gave notice to defendant that he elected to avoid his contract and trade for the buggy, and had, previous to the bringing of this suit, brought a former suit for the recovery of the horse, and caused a summons and writ of replevin to be served on defendant for said horse, which suit was dismissed before bringing this suit, and that defendant at the time of such notice and since that time has had said buggy in his possession, and has been placed *in statu quo*, then the plaintiff is entitled to recover."

As no errors are assigned by the defendant, either formally or in his brief, we would be justified in affirming the judgment upon that ground alone. Still, as the defendant's counsel has filed an elaborate printed argument, indicative of what he complains, we prefer to decide the case upon its merits.

The defendant's argument is in substance to this effect: All contracts of infants are voidable only, and the plea of infancy is one of personal privilege available to the infant alone. There is nothing to show that the

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infant plaintiff ever sought to avoid his contract; on the contrary, his own evidence, as above, indicates that he has at all times recognized the validity of the *debt*, and did so even upon the trial. The vice of this argument is that it treats the debt and mortgage as inseparable parts of the same contract, whereas the validity of the debt in no sense depends on the validity of the mortgage, though the converse proposition is true. Now, in the case at bar, it appears from all the evidence, that, while the infant never repudiated the debt, he never recognized the validity of the mortgage, but expressly repudiated it by bringing his first action of replevin. The question for decision in this case was not whether the plaintiff owed the defendant anything, but whether the defendant had a valid lien upon the plaintiff's horse for the debt thus owing. Upon that view, the declaration of law made by the court upon evidence warranting it, was clearly correct. Treating the mortgage as voidable by the infant, and as repudiated by him prior to the institution of this suit, the court simply found that the defendant by retaking the buggy, retook the consideration for the debt, and the case presented no equities for adjustment, as the case of *Betts v. Carroll*, 6 Mo. App. 518, relied on by defendant, clearly did.

Judgment affirmed. All the judges concur.

William Walsh, Respondent, v. St. Louis Drayage Company, Appellant.

St. Louis Court of Appeals, April 1, 1890.

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Practice, Appellate: NON-PREJUDICIAL ERROR. Although it is erroneous for a trial court to give an oral instruction to the jury, still, the instruction is not prejudicial, and is not ground for the reversal of the judgment appealed from, if it relates wholly to a conceded matter.

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Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

Henry B. Davis, for the appellant.

Willis H. Clark, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action for personal services as a teamster, and was originally instituted before a justice of the peace. The account filed claims a balance due of seventeen dollars and fifty cents for two weeks' services at ten dollars per week, less a credit of two dollars and fifty cents for cash paid. The defendant tendered before the justice of the peace to the plaintiff one dollar and sixty-five cents as a balance due him, and renewed the offer in the circuit court, its counsel admitting in his opening statement to the jury that that amount was justly due. On trial in the circuit court the plaintiff recovered a judgment for fourteen dollars and fifteen cents. The defendant, appealing, assigns for error that there was no evidence of a contract for a stated compensation, on the part of anyone authorized to bind it, and no proof of the value of the services rendered; that the court erred in refusing an instruction that the plaintiff's recovery was limited to the one dollar and sixty-five cents, admitted to be due, and further erred in giving an oral instruction to the jury.

The plaintiff testified that he was employed by the defendant's foreman at ten dollars per week, and that the foreman hired all teamsters; that Henseler, who was shown to have signed the recognizance on appeal from the justice as president of the defendant company, saw the plaintiff at work frequently, and paid him by checks on Saturdays at the rate of ten dollars a week, and that he, plaintiff, claimed in this action only for days on which he did work for the company and for

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which he remained unpaid. This evidence, coupled with the admission on the part of the defendant that it did owe the plaintiff some amount for services as a teamster during the period of employment sued for, was sufficient to make out a *prima facie* case for the plaintiff, that he was hired at an agreed compensation, and that the amount he recovered was due him. The court, therefore, properly refused the defendant's instruction, that the plaintiff's recovery under the evidence was limited to one dollar and sixty-five cents.

After the case was argued to the jury, the court said to them: "Gentlemen of the jury, under the evidence and instruction, you are bound in any event to find a verdict for the plaintiff, and the only question is as to the amount that you may find under the evidence. I have prepared for you a blank form of verdict which you may use."

Instructions under our statute must be in writing, but the supreme court has frequently decided, that erroneous instructions are no ground for reversal, where the facts are conceded. If, therefore, the oral instruction to the jury that they must find for plaintiff was erroneous, because oral, it would furnish no ground for reversal, because it was touching a conceded fact, namely, that the only question for the jury to pass upon, was not the right of plaintiff's recovery, but its extent. The judgment is affirmed. All concur.

JOSEPH B. NELSON, Executor of HERMAN WOOSTERMEIER, Appellant, v. JOSEPH SUDIEK, Respondent.

St. Louis Court of Appeals, April 1, 1890.

Donation Causa Mortis. A gift made by a decedent in contemplation of, and immediately prior to, his death, and consummated by delivery, is valid.

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Appeal from the Lincoln Circuit Court.—Hon. E. M. Hughes, Judge.

Affirmed.

Martin & Avery, for the appellants.

(1) The court should have allowed plaintiff to prove the contents of the first will. It being destroyed, secondary evidence was admissible. *Foulk v. Collbum*, 48 Mo. 225. (2) The evidence does not show that Woostermeier constituted and appointed the defendant a trustee, but at best only his agent to loan the money for him. The money was not loaned during Woostermeier's life, and his death revoked the agency. *Deck v. Page*, 17 Mo. 234. The offer of defendant to give plaintiff the note taken by him shows that he did not consider himself a trustee. Perry on Trusts, sec. 97. (3) The money in the hands of the defendant at the time of Woostermeier's death belonged to his estate and the plaintiff was entitled to the same. *Hannenkamp v. Borgmeier*, 32 Mo. 568; *State v. Moore*, 18 Mo. App. 406; *Rouggley v. Teichmann*, 10 Mo. App. 257.

Judson & Reyburn and *R. H. Norton*, for the respondent.

There is clearly no error in this record. The issue made by the pleadings was simply whether the money in defendant's hands was recoverable by the executor as part of the estate, or whether it had been transferred by an executed gift prior to decedent's decease. Upon this issue it was wholly immaterial what disposition was made of the property of the deceased by his will, and *a fortiori* it was immaterial what disposition he had intended making in the revoked will, or what he had formerly intended to do with the money. *Priest v. Way*, 87 Mo. 16; 1 Woerner on Amer. Law of Adm'n, p. 116. The gift in the case at bar was valid.

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It had all the requisites of a gift *causa mortis*. *Shackelford v. Brown*, 89 Mo. 546; *Trorlicht v. Weizenecker*, 1 Mo. App. 482.

ROMBAUER, P. J., delivered the opinion of the court.

The petition charges the defendant with having received nine hundred dollars on deposit from plaintiff's decedent, for which he refused to account to the plaintiff, the decedent's lawful executor. The answer admits the receipt of the nine hundred dollars, but denies that it was a deposit as stated in the petition. The answer further states that the decedent, shortly before his death, and in view of his speedy dissolution, being desirous of making a gift to his two minor children, delivered the money to the defendant, in trust for such children and with instructions to loan it out in a certain manner; that the defendant thereupon did loan out the money as then requested, and holds the note of the borrower for the same. The answer was denied by reply, the cause was tried by the court without a jury, and no declarations of law were asked or given. The court upon the evidence rendered a judgment for the defendant.

The plaintiff complains that the court would not permit him to prove what a former will of the decedent contained, which will is admitted to have been canceled, nor what the last will of the decedent does contain, which will is preserved in the record; also that the court would not permit him to prove that the decedent on former occasions wanted a different disposition to be made of the money. It is not conceivable on what theory the plaintiff claims any of this evidence to be admissible under the pleadings, which raise the sole issue, whether the nine hundred dollars delivered to the defendant was a simple deposit, or was a gift in anticipation of death. The pleadings raise no issue of undue influence, even if such issue could have been raised in this form of action.

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There is no controversy in the evidence. The only witnesses to the transaction are the decedent's two children, one of whom testified for the plaintiff, and the other for the defendant. They concur in stating that, shortly before his death, the decedent sent for the defendant, who is a priest, and had a conference with him; that, when the conference was ended, they were called in, and their father told them that he was going to give to the defendant nine hundred dollars to loan out for them, and that the money was thereupon counted, and taken possession of by the defendant. A nephew of the decedent testified that the decedent told him that he had given the defendant the money to loan out for the benefit of his children, stating the rate of interest. There is absolutely no controversy touching the fact that the decedent made the gift in contemplation of death, and that he died shortly thereafter, and that the gift was consummated by delivery. Under the decisions of *Shackelford v. Brown*, 89 Mo. 546, and *Trorlicht v. Weizenecker*, 1 Mo. App. 482, the judgment of the court on the conceded facts is correct, and the record brought here presents nothing for review.

Judgment affirmed. All concur.

THE STATE OF MISSOURI, Appellant, v. T. J. ATKINS, Respondent.

St. Louis Court of Appeals, April 1, 1890.

1. **Criminal Law: INDICTMENT FOR SELLING INTOXICATING LIQUORS.** An indictment, which charges the defendant with having made several sales of intoxicating liquors at the same time, charges but one offense.

2. ———: ———. The statement of the offense in the indictment in such case is sufficient, if it follows the language of the statute.

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Appeal from the Oregon Circuit Court.—HON. J. F. HALE, Judge.

REVERSED AND REMANDED.

T. J. Braswell, Prosecuting Attorney, for the appellant.

Evans, Clarke & Smith, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

An indictment, duly preferred against the defendant in this case under section 1581 of the Revised Statutes of 1879, was quashed by the circuit court upon the defendant's motion challenging it as being vague, uncertain and indefinite, and as setting out several offenses in one count. From this judgment the state appeals. The indictment thus quashed is in the follow-lowing words:

"STATE OF MISSOURI, } In the Circuit Court, February
"County of Oregon. } Term, 1889.

"The grand jurors for the state of Missouri summoned from the body of Oregon county, duly impaneled, sworn and charged to inquire into and true presentment make within and for said county of Oregon and state of Missouri, upon their oaths do present and charge that one T. J. Atkins, late of said county, at and in said county, on the seventeenth day of February, 1889, said day being the first day of the week, commonly called Sunday, and, he having then and there a license as a dramshop-keeper, did then and there unlawfully and wilfully sell, give away, and otherwise dispose of certain intoxicating liquors, to-wit: One drink of whiskey, one drink of wine, and one drink of lager beer, upon or about his premises, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state."

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It was decided in *Storrs v. State*, 3 Mo. 9, that an indictment, charging several sales at the same time, charges but one offense. That has ever since been the law of this state, and the case has been frequently cited and approved. That the indictment was sufficiently definite in other respects is borne out by *State v. Williamson*, 21 Mo. 496; *State v. Roehm*, 61 Mo. 82; *State v. Braun*, 83 Mo. 480.

The judgment is reversed, and the cause remanded for further proceedings. All the judges concur.

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J. R. HAYDEN, Defendant in Error, v. CHRISTIAN BURKEMPER, Plaintiff in Error.

St. Louis Court of Appeals, April 1, 1890.

1. **Emblements: AS BETWEEN MORTGAGOR AND MORTGAGEE.** Annual crops planted on mortgaged lands by the mortgagor, or by one claiming under him, and remaining unsevered at the time of the foreclosure of the mortgage, but subsequently severed by the mortgagor while still in the possession of the lands, pass to the purchaser at the foreclosure sale as against the claims of the mortgagor, or of such claimant under him, provided that they were sown after the condition broken; *sed aliter*, if such crops were planted before condition broken.

Per Thompson, J., dissenting:

2. ———. Such crops remain the property of the mortgagor, or of such claimant under him, whether sown before or after condition broken.

Writ of Error to the St. Charles Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED (*and certified to the Supreme Court*).

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R. H. Norton and *T. F. McDearmon*, for the plaintiff in error.

(1) The court erred in refusing the first instruction asked by defendant. It was a correct declaration of law in the case. *Jenkins v. McCoy*, 50 Mo. 349; *Adams v. Leip*, 71 Mo. 598; *White v. Wear*, 4 Mo. App. 341; *Harris v. Turner*, 46 Mo. 438; *Kennett v. Plummer*, 28 Mo. 145; *Morgner v. Biggs*, 46 Mo. 66; *McAllister v. Lawler*, 32 Mo. App. 91. (2) The court erred in refusing defendant's second instruction. It was a correct declaration of law in the case. *Adams v. Leip*, 71 Mo. 597; *Jenkins v. McCoy*, 50 Mo. 348; *Harris v. Turner*, 46 Mo. 438; *McAllister v. Lawler*, 32 Mo. App. 91. (3) Defendant's third instruction was correct and should have been given. *Morgner v. Biggs*, 46 Mo. 66, and authorities, *supra*.

Theodore Bruere, for the defendant in error.

(1) The court was right in refusing the first instruction asked by plaintiff in error. This is no case where the mortgagee entered for breach of condition of the mortgage. A sale had taken place under a deed of trust and the purchaser at said sale became entitled to the possession of the lands and to the crops then growing thereon. All rights Burkemper had before the sale to sever the crop from the land were gone and extinguished by the sale. *Steele v. Farber*, 37 Mo. 80; *Salmon v. Fewell*, 17 Mo. App. 118. (2) The court properly refused the second instruction asked by plaintiff in error. *Garth v. Caldwell*, 72 Mo. 622; *Salmon v. Fewell*, 17 Mo. App. 123; *Culverhouse v. Worth*, 32 Mo. App. 427; *Wallace v. Cherry*, 32 Mo. App. 436. (3) The third instruction refused by the court is not the law nor was there any evidence that the wheat crop was put in with the approval of defendant in error. The

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mere fact that he permitted the plaintiff in error to sow wheat cannot change the terms of the deed of trust nor effect his rights under it.

ROMBAUER, P. J., delivered the opinion of the court.

This record raises the mooted question whether, under the decisions in this state, as between the mortgagor and mortgagee, in case of a forced sale, the former or the latter is entitled to the annual crop of cereals growing on the premises sold, and unsevered from the land on the day of sale, but subsequently severed by the mortgagor, and harvested while he is still in possession of the premises.

The action is one of replevin for eighteen hundred shocks of wheat, of the alleged value of eight hundred dollars. The answer, besides a general denial, raises some affirmative defenses, which we deem it unnecessary to notice, as no evidence was offered in their support, and hence the decision of the case depends almost exclusively on the correct answer to be given to the inquiry above propounded.

The case was tried by the court without a jury, and the following facts were shown by the plaintiff's evidence, which was all the evidence in the case: The plaintiff, in September, 1882, sold the farm, on which this wheat was subsequently grown, to one Cambron for twelve thousand dollars, and took from him a deed of trust on the land conveyed, securing the deferred payments of the purchase money. These deferred payments consisted of two principal notes, one for two thousand dollars, and one for fifty-five hundred dollars, and five interest notes of three hundred and ninety-five dollars each. Cambron subsequently sold the land to the defendant, who assumed the payment of this incumbrance. In June, 1887, a Mrs. Stahlschmidt was the holder of the principal note for two thousand dollars, and one Dyer the holder of the principal note for fifty-five hundred dollars, as collateral for moneys advanced

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and liabilities incurred for plaintiff. Both of these notes were wholly unpaid. The defendant had paid seven hundred dollars, on account of the first two interest notes, but the residue of the interest notes were also unpaid and were, at the date of sale, held by the plaintiff. There was evidence tending to show that the plaintiff frequently urged the defendant to pay up the incumbrance, or part of it, and that defendant made repeated promises to do so, but always failed to fulfill them; but there was no evidence that the plaintiff advised the defendant of his intention to foreclose prior to steps taken for that purpose by advertisement. The plaintiff was aware that the defendant was raising a wheat crop on the premises, as he resided in the neighborhood of the land and saw it frequently. The trustee's sale took place June 4, 1887, and Dyer became the purchaser for eighty-eight hundred dollars. It was in evidence that Dyer bought the land at plaintiff's request, with an understanding that he should hold it for the plaintiff until he, Dyer, was reimbursed for moneys advanced to plaintiff and liabilities incurred for him, and should then convey it to the plaintiff. No money passed at the sale. On the eighth of June, 1887, Dyer made a bill of sale to the plaintiff of fifty acres, more or less, of the growing wheat on the farm purchased by him at trustee's sale. What transpired afterwards is thus stated by the plaintiff: "I saw him (the defendant) about the wheat, he said he was going to cut it. I got the machine and he (*sic*) the men engaged to cut it, and went to him, and he made the arrangement to board me; he said he would take the wheat if I cut it, but it appears that, when the wheat was cut, he got out of the notion, and said he would cut the wheat himself. I went around after the sale, I said are you going to cut this wheat, I said, 'If you are going to cut it, I will not bother you, but I want to know if you are going to cut it,' he said, 'I am going to cut

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it;' he said, 'I will go and take the wheat if you cut it.' "

"*Q.* He cut it himself? *A.* Yes, sir."

The plaintiff further testified that the wheat, on the day of sale, was nearly ready to cut, and his purpose for advertising the sale at that time was to get a claim upon the wheat before it was harvested, and to keep the defendant from getting away with the wheat.

Upon the facts thus shown, the court rendered judgment for the plaintiff for possession, and nominal damages; and, as the facts are uncontroverted, the only question for decision is whether, under the facts shown, the plaintiff or the defendant was entitled to the possession of the wheat.

The general rule recognized in this country is that a tenant, whose term is for an uncertain period, shall reap a crop which he sows, even though his term expires before the crop matures. This rule, however, has never prevailed as between mortgagor and mortgagee. Whatever crops are, at the date of the foreclosure, growing upon the mortgaged premises, if planted after the mortgage is made, become the mortgagee's, whether planted by the mortgagor or his tenant, free from any claim upon them by such tenant; but a foreclosure, after the crops are severed, does not carry an interest in them to the mortgagee or purchaser. 1 Washburn Real Prop. [5 Ed.] 144; 2 Jones on Mort., sec. 1658. Professor Washburn admits that the rule is limited to cases where the mortgage creates an estate in the land, and not a mere lien, since it seems to be settled that a tenant, who hires land subject to a judgment lien, and plants crops upon them prior to the sale of the premises, may claim them against a purchaser at the sheriff's sale upon execution under the judgment. And Mr. Jones, in the section above quoted, says that, in states where a mortgage creates no estate in the mortgagee, but confers on him only a lien, the

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rule has been established that the mortgagor and his tenant may claim the crops he has sown, which are growing at the time of the foreclosure of the mortgage. In support of this proposition, the author cites *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Allen v. Elderkin*, 62 Wis. 627; and *Gregory v. Rosenkrans*, 72 Wis. 220. An examination of these cases shows, however, that the author's text finds support only in the Indiana case, the Wisconsin cases resting on the proposition that a foreclosure by sale, without confirmation, does not divest the mortgagor's title, hence he may remove crops growing on the land at the date of the foreclosure sale, provided the severance takes place before the confirmation of such sale.

Now in this state the rule has always been that a mortgage or deed of trust is a mere security for the debt, and that the legal title remains in the mortgagor until condition broken. *Kennett v. Plummer*, 28 Mo. 145. But, after condition broken, the legal title passes to the mortgagee, subject to defeasance by payment of the debt before foreclosure (*Pease v. Pilot Knob Iron Co.*, 49 Mo. 124), and there is no difference in that respect between a mortgage and a deed of trust. *Johnson v. Houston*, 47 Mo. 227. Thus it was held that a mortgagee, after condition broken, may maintain ejectment for the mortgaged land. *Reddick v. Gressman*, 49 Mo. 389, and the cases of *Johnson v. Houston*, 47 Mo. 227, and *Siemers v. Schrader*, 88 Mo. 23, recognize that a trustee in a deed of trust may do the same after default in payment of the debt secured, and before foreclosure by sale.

In the case at bar the deed of trust among other notes secures two interest notes, due respectively September 11, 1885, and 1886, and one principal note for two thousand dollars, due September 11, 1885. These notes, though due, were unpaid when the wheat in controversy was sown, and remained unpaid until after

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foreclosure by sale in 1887. Hence it is evident that, at the date when the wheat was sown, and from thence continually until it matured, the legal title to the land on which it grew was in the trustee under the deed, and not in the mortgagor. Under these circumstances there is nothing in this case taking it out of the rule, which is recognized everywhere, that, where a mortgagee conveys the legal title, crops growing upon the land at date of foreclosure, are property of the mortgagee, and pass to the purchaser at the foreclosure sale, since, at the date when they were sown, the mortgage or deed of trust had ceased to be a mere lien, and had ripened into a defeasible legal title.

There is nothing in the decisions in this state which is opposed to this view, although it is often difficult to discover the exact principle on which some of them rest. In *Steele v. Farber*, 37 Mo. 80, the contest was in regard to priority of right between an attaching creditor of the mortgagor, and the mortgagee in possession, but, as it stood admitted that the mortgagee had entered prior to the harvest, and that the mortgagor, in harvesting the crop, had acted as his agent and by his request, the points *decided* furnish no authority in this case one way or another. *Jenkins v. McCoy*, 50 Mo. 348, merely decides that the value of a crop raised by a trespasser upon land is not the measure of damages in an action of trespass by the owner against the trespasser, while *Morgner v. Biggs*, 46 Mo. 66, illustrates the proposition hereinabove stated, that a lessee or licensee for an uncertain period is entitled to harvest the crops he sows, although his right of occupancy expired before they mature. *Adams v. Leip*, 71 Mo. 598, seems to extend the same right to an adverse occupier, although, since that was also an action of replevin, the case is determined by the proposition decided in *Jenkins v. McCoy*, *supra*. Neither of these cases were contests between the mortgagor and the mortgagee, or the mortgagor and a purchaser at the foreclosure sale.

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The first contest of this character seems to have arisen in *Salmon v. Fewell*, 17 Mo. App. 123. That case decides on the authority of *Garth v. Caldwell*, 72 Mo. 622, that annual crops of cereals, while unsevered from the land, are personal property and subject to replevin, and also that such crops will pass to the purchaser at the foreclosure sale of a mortgage, as against the tenant who sowed them. The point did not arise for decision, whether the latter would be the rule, if the crops were sown before condition broken. In *McAllister v. Lawler*, 32 Mo. App. 91, the contest was also between a mortgagor and a purchaser at foreclosure sale; the crops were growing on the premises at the time of the sale, and were severed thereafter by the mortgagor who remained in possession, and we held that replevin would not lie by the purchaser. It did not appear in that case either whether the crops were sown before or after condition broken, but the language of Judge PEERS is broad enough to warrant the conclusion that the court deemed it immaterial, whether they were sown before or after, while, under the general principle stated by Prof. Washburn, and Mr. Jones, and recognized in the case of *Heavilon v. Farmers' Bank*, *supra*, that should be a very material inquiry. In the subsequent case of *Wallace v. Cherry*, 32 Mo. App. 436, Judge ELLISON, speaking for the court broadly states "that there never has been any question that, as between a mortgagor or a stranger and the mortgagee, a sale of the mortgaged premises covered growing crops;" yet, as above seen, there has been a serious question on that subject, raised by both text-writers and judges.

Endeavoring to deduce a principal from the universally recognized rule, and the many decisions in this state, we come to this conclusion: Where lands are subject to a mere lien at the time the crop is sown, the person in possession who sows the crop is entitled to

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harvest it, and it is immaterial, as it must be immaterial on principle, whether the lien is one created *in invitum* or by the acts of the parties, the lien of a judgment or the lien of a mortgage; but in all cases where the mortgage conveys the legal estate, or the legal estate by condition broken becomes vested in the mortgagee, and the crops are sown after the legal estate thus vests, and are unsevered at the date of the foreclosure or entry by the mortgagee for condition broken, the title to them passes to the mortgagee or purchaser at foreclosure sale, and such title cannot be divested by a subsequent severance by the mortgagor.

This ruling seems to reconcile decided cases, and is opposed to no decisions. It is in harmony with the decisions in all other states where the common law is known and is administered, and we cannot assume that the supreme court of this state ever intended to lay down a rule on this subject different from that in any other state. The rule is just and equitable, because it advises the mortgagor that he sows crops after condition broken, and at a time when the legal estate has passed from him, subject to the mortgagor's right of re-entry at any time.

Upon the conceded facts of the case these views lead to an affirmance of the judgment, and with the concurrence of Judge BIGGS it is affirmed. Judge THOMPSON dissents, being of opinion that the decision rendered is opposed to *Jenkins v. McCoy* and *Adams v. Leip*, *supra*. It is, therefore, ordered that the case be certified to the supreme court for final determination, and that, until final determination by that court, all further proceedings on this judgment be stayed.

THOMPSON, J. (*dissenting*).—I do not concur in this opinion. I cannot reconcile it with the doctrine of the following cases: *Adams v. Leip*, 71 Mo. 597, *Jenkins v. McCoy*, 50 Mo. 349; *Harris v. Turner*, 46 Mo. 438;

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McAllister v. Lawler, 32 Mo. App. 91. The mortgagee, after condition broken, is not the beneficial owner of the property; he does not become such until entry or purchase at a foreclosure sale. The legal title passes to him, but only as a security for the debt. *Kennett v. Plummer*, 28 Mo. 145; *White v. Wear*, 4 Mo. App. 341. Growing crops are personal property, independent and distinct from the land. *Garth v. Caldwell*, 72 Mo. 627. When the mortgagee enters or purchases at a foreclosure sale, he certainly does not acquire any higher title to them, than if they had been grown on his land by a trespasser. The decisions first cited show that a mere trespasser can hold a crop, which he has raised on land and harvested, against the real owner of the land. It would introduce a great incongruity into the law to hold that the grantor in a deed of trust in possession, although after condition broken, has not as good a title to the crop, which he plants and harvests on land, as a trespasser without any right whatever. The decisions first cited establish an exceedingly simple and just rule, and one which is capable of easy application in all cases. That rule is that the title to crops grown upon land follows the possession of the land, in such a sense that, if he that sows them harvests them before the real owner enters, he gets them, and they cannot be taken from him in replevin. We merely followed and applied that rule to such a case as the one now before us, in *McAllister v. Lawler*, *supra*, and we ought not to overrule that case without cogent reasons, as it established a rule of property.

I think that this case is opposed to the decisions of the supreme court in the four cases first above cited, and that it hence ought to be certified to that court in conformity with the constitutional mandate.

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STATE OF MISSOURI, Appellant, v. DAVID McDANIEL, Respondent.

STATE OF MISSOURI, Appellant, v. JACOB MOORE, Respondent.

St. Louis Court of Appeals, April 1, 1890.

Criminal Law: INFORMATION. An information for the disturbance of a religious meeting is sufficiently definite, if it charges the offense in the terms of the statute.

Appeal from the Oregon Circuit Court.—HON. J. F. HALE, Judge.

REVERSED AND REMANDED.

T. J. Braswell, Prosecuting Attorney, for the appellant.

Evans, Clarke & Smith, for the respondents.

THOMPSON, J., delivered the opinion of the court in the case of State of Missouri *v.* David McDaniel.

This prosecution was commenced before a justice of the peace on the following criminal information:

"Information for a misdemeanor.

"STATE OF MISSOURI, }
"County of Oregon, } ss.

"State of Missouri *v.* "David McDaniel. } Before A. J. STILL, a Justice of the Peace within and for Oregon county, Missouri, Piney township.

"Disturbing religious worship.

"T. J. Braswell, upon his oath of office as prosecuting attorney within and for the county of Oregon and state of Missouri, informs the justice that one

David McDaniel, late of the county of Oregon and state of Missouri, on the sixth day of July, A. D. 1889, at and in the said county of Oregon and state aforesaid, did then and there unlawfully, wilfully, maliciously and contemptuously disquiet and disturb a certain congregation of people, then and there met together for the purpose of religious worship at the Jolliff schoolhouse in Highland township, Oregon county, Missouri, said schoolhouse being set apart, appropriated and used by a congregation of persons for the purpose of religious worship, by then and there making a loud noise, and by rude and indecent behavior, and by profane discourse within their place of worship and so near the same as to disturb the order and solemnity of the meeting, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state. T. J. BRASWELL,
"Prosecuting Attorney."

In the circuit court the defendant moved to quash this information on the ground that it is indefinite, and does not inform the defendant sufficiently of the charge he must meet, and on the further ground that it charges several distinct offenses in one count. The circuit court sustained this motion, and the state appeals to this court. Neither party has filed a statement or brief; but, as it is a criminal case, we have examined the record, as by section 4297 of the Revised Statutes of 1889 (Revised Statutes, 1879, sec. 1993) we are required to do.

We are of opinion that this information is sufficient. The information, it is perceived, was drawn under the provisions of section 1528 of the Revised Statutes of 1879 (Revised Statutes, 1889, sec. 3785), and follows the language of the statute. This, in general, is sufficient. *State v. Fare*, 39 Mo. App. 110, and cases there cited. It was not necessary to set out the language used, either in detail or in substance. Our decision to

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that effect in *State v. Bach*, 25 Mo. App. 554, which was rendered under the preceding section of the statute, has been overruled in *State v. Fare*, *supra*.

This information furnishes no room for an argument to the effect that it describes two offenses.

The judgment will be reversed, and the cause remanded. All the judges concur.

Rombauer, P. J., delivered the opinion of the court in the case of State of Missouri *v.* Jacob Moore.

The record in this case presents the identical questions discussed and decided at the present term in *State v. McDaniel*, *ante*, p. 356. For reasons given in the opinion filed in that case, the judgment in this case must also be reversed. Reversed and remanded. All the judges concur.

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State of Missouri, Appellant, v. David Hatfield, Respondent.

St. Louis Court of Appeals, April 1, 1890.

Criminal Law: informations. An information must be based either upon the personal knowledge of the prosecuting attorney, or upon that of some private person, who lodges with the prosecuting attorney a complaint setting forth the facts, and verifies the same by his affidavit.

Appeal from the Knox Circuit Court.—Hon. Ben. E. Turner, Judge.

Affirmed.

William Clancy, Prosecuting Attorney, for the appellant.

G. R. Balthrope, for the respondent.

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THOMPSON, J., delivered the opinion of the court.

This is a criminal prosecution, commenced before a justice of the peace on the following information:

"STATE OF MISSOURI, }
"County of Knox, } ss.

"Before THOMAS WELCH, a justice of the peace of Greensburg township, in said county.

"I, William Clancy, prosecuting attorney of Knox county, Missouri, on my oath of office do hereby make in writing this my *information:* That, on the fourth day of July, 1889, at a certain place of business at or near the town of Baring, in Knox county, aforesaid, one David Hatfield did then and there unlawfully sell intoxicating liquors in less quantity than one gallon, to-wit: One pint of whiskey, one pint of brandy, one pint of Japan bitters, one pint of gin, one pint of rum, one pint of wine, one pint of beer, without first taking out or having a license as a dramshop-keeper, or any other legal authority so to sell the said intoxicating liquors, and contrary to the statute in such cases made and provided, and against the peace and dignity of the state. WILLIAM CLANCY,
"Prosecuting Attorney."

An appeal was taken to the circuit court, and there the information was quashed. The state appeals to this court, and the prosecuting attorney begs us, in view of the conflict between the decisions of this court, hereafter cited, and the decision of the Kansas City Court of Appeals, in the case of *State v. Fletchall*, 31 Mo. App. 296, to settle the law on the subject of criminal informations before justices of the peace. We have settled it, as far as we can, to the effect that, since the act of 1885 (Laws, 1885, page 145), such an information must be based on the *personal knowledge* of *some one*, either on that of some private person lodging with the prosecuting attorney a complaint verified by affidavit

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and setting forth the facts, or on an information filed by the prosecuting attorney on his own personal knowledge, without such complaint. *State v. Wilkson*, 36 Mo. App. 373. See, also, *State v. Harris*, 30 Mo. App. 82. Our decisions on this point are in distinct accord with the decisions of the Kansas City Court of Appeals in *State v. Humble*, 34 Mo. App. 343, which entirely overrules the decision of the same court in *State v. Fletchall*, *supra*, though without mentioning it.

Judgment affirmed. All the judges concur.

SOUTH MISSOURI LAND COMPANY, Appellant, v. HENRY JEFFRIES, Respondent.

St. Louis Court of Appeals, April 1, 1890.

1. **Evidence:** JUDICIAL NOTICE. The court knows judicially that the abbreviation "Supt." stands for the word superintendent, and that a superintendent is a managing officer.

2. **Corporations:** SEALS. A corporation can only execute a formal bond with its corporate seal, countersigned by an officer entitled to affix its seal.

3. **Justices of the Peace:** REPLEVIN. In an action of replevin (instituted in the case at bar before a justice of the peace) the bond requisite to an order of delivery need not be executed by or in the name of the plaintiff, but may be given on behalf of the plaintiff by and in the name of a third person as principal.

4. ——— : ———. If, in an action of replevin, instituted before a justice of the peace, the bond given to procure an order of delivery is invalid, that is not ground for the dismissal of the action; but *semble*, that the circuit court might, on an appeal of the cause, require new bond.

5. ——— : ——— : AMENDMENT. If the statement and affidavit filed before the justice in such action be not nullities, they may be amended in the circuit court on such appeal.

Appeal from the Howell Circuit Court.—HON. JAMES ORCHARD, Special Judge.

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REVERSED AND REMANDED.

Olden & Green, for the appellant.

Evans & Clarke, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action of replevin, commenced before a justice of the peace. In the circuit court a motion was made to dismiss the cause, on the following grounds: *First.* Because there was no affidavit to the plaintiff's statement. *Second.* "Because the bond, both for replevin and appeal, is not signed by the proper officer of the South Missouri Land Company, a corporation." The circuit court sustained the motion, and the plaintiff prosecutes this appeal.

The statement is subscribed by the "South Mo. Land Co., W. E. Drew, Supt." It purports to be sworn to by W. E. Drew, who in the affidavit is described as "Supt. Mo. Ld. Co.," but the affidavit is not signed by him. In all other respects it is formal. The statute (Revised Statutes, 1879, section 2882) provides that the statement "shall be verified by the affidavit of the plaintiff, his agent or attorney." The court knows judicially that the abbreviation "Supt." stands for the word superintendent, and that a superintendent is a managing agent. This affidavit is, therefore, verified by the plaintiff's "agent," and is hence sufficient, except for the informality above mentioned.

The replevin bond was signed as follows: "So. Mo. Land Co., W. E. Drew, Supt., A. G. Hollenbeck." It is nowhere stated in the proceedings, except in the defendant's motion to dismiss, that the plaintiff is a corporation, except so far as an inference arises from its possessing a name such as is appropriate to an incorporated company. But, whether a corporation or not, the bond is a nullity, so far as it purports to be the

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bond *of the corporation.* If a corporation, it could only execute a formal bond by its corporate seal, countersigned by an officer entitled to affix its seal,—that is, by its president or secretary. If not a corporation, but a mere voluntary association, its members could not bind themselves by assuming a corporate name and signing a bond by such name. But the bond is not a nullity for the reason that it is not good as the obligation of the plaintiff. The statute (Revised Statutes 1879, section 2884), provides that, "If the plaintiff shall deliver to the justice a bond, executed *by one or more sufficient sureties*," etc., the justice may make a delivery order of the property. And although the next section, which gives a form in which the bond *may* be executed, contemplates that it shall be signed by the plaintiff, which is certainly usual and proper,—yet, the statute above quoted does not make this necessary. Undertakings for plaintiffs in judicial proceedings are very commonly given by third parties. The joinder of the plaintiff therein is in strictness not necessary, since he is liable without it. Thus, in the case with which we are dealing, the plaintiff is liable for the return of the property, if cast in the suit, equally, whether he signs the replevin bond or not, and the bond although not signed by the principal, is binding on the surety.

But, assuming that the replevin bond in this case is a nullity, it would afford no reason for dismissing the suit, since the action might have been prosecuted without bond. R. S. 1879, sec. 2887. The circuit court might, it seems, under a provision of the general statute relating to replevin (Revised Statutes, 1879, sec. 3851), have required the plaintiff to give a new bond, and, in default thereof, might have ordered the property to be delivered to the defendant; but the nullity of the bond (assuming it to be void), or the entire absence of a bond, would afford no reason for dismissing the suit.

The plaintiff, before the motion to dismiss the suit was decided, asked leave of the court to allow W. E.

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Drew, the superintendent of the plaintiff, to sign the affidavit, which leave the court refused. This was error. *Crum v. Elliston*, 33 Mo. App. 591. See, also, *Claflin v. Hoover*, 20 Mo. App. 314.

The plaintiff also, before the motion to dismiss had been decided, asked leave to file an amended statement and affidavit, which the court denied. This was error, for the reason stated in the cases just cited. The statement and affidavit were not so defective as to be nullities within the meaning of the decision of the Kansas City Court of Appeals, in *Turner v. Bondalier*, 31 Mo. App. 582. See, also, *Stewart v. Cabanne*, 16 Mo. App. 517; *Middleton v. Frame*, 21 Mo. 412.

The judgment will be reversed and the cause remanded. All the judges concur.

In the Matter of THE BIG HOLLOW ROAD, etc.; B. F. ENGLAND *et al.*, Petitioners, Appellants, v. HENRY BAILEY *et al.*, Remonstrants, Respondents.

St. Louis Court of Appeals, April 1, 1890.

1. **Public Roads:** VACATION OF ROAD. In a proceeding under the statute for the vacation of a county road by the county court, the right of freeholders to remonstrate is not confined to those whose lands are crossed or touched by the road, but such remonstrance may be filed by any twelve or more resident freeholders of the township or townships.

2. **Appeal:** VACATION OF PUBLIC ROAD. The remonstrants in such a proceeding have the right of appeal to the circuit court from an order of the county court, vacating such road and assessing a part of the costs against them.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

CERTIFIED TO THE SUPREME COURT.

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Joseph J. Williams, for the appellants.

Thomas & Horine, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This was an appeal to the circuit court from an order of the county court of Jefferson county, vacating a portion of a public road in Plattin township in that county. The proceeding was instituted, under section 29 of the general road laws of 1887 (Sess. Acts, 1887, page 252), by a petition signed by more than twelve freeholders of Plattin township. A remonstrance was filed in the county court by more than twelve freeholders of that township. The county court made an order vacating the road and assessing a portion of the costs against the remonstrants. The remonstrants appealed to the circuit court. Upon a hearing in that court the prayer of the petition to vacate the road was denied, and the petition dismissed at the cost of the petitioners. A motion in arrest of judgment was filed on the ground that the circuit court had no jurisdiction, and that the remonstrants had no right to prosecute the appeal. This motion was overruled.

The petitioners now appeal to this court, and assign for error the overruling of their motion in arrest of judgment, and base their assignment upon the argument that, as the remonstrants were not freeholders whose lands were crossed or touched by the road proposed to be vacated, they had no interest in the matter such as entitled them to appeal. We do not take this view. The statute (Laws, 1887, page 252, section 29) provides that "if a remonstrance thereto, in writing, signed by at least twelve freeholders, *residents of such township* or townships be filed, and the court, after considering the same, shall decide that it is just to vacate such road, or any part thereof, against the vacation of which the remonstrance was filed, the costs shall

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be paid by the parties remonstrating." The statutes nowhere confine the right of filing such a remonstrance to freeholders of the township whose lands are crossed or touched by the road proposed to be vacated. It recognizes that such freeholders have a special interest in the matter, by providing that they shall be personally served with notice of the filing of the petition; but it also recognizes the interest of other freeholders of the township in the proceeding, by providing for the posting of notices of the filing of the petition in not less than three public places in the township. The statute does not require that the *petition* to vacate the road shall be filed by freeholders whose lands are crossed or touched by the road, but allows such petition to be filed by "any twelve freeholders of the township or townships over which a road runs." It is very clear that the right to remonstrate, as well as the right to petition, is given to the freeholders of the township or townships through which the road runs, without reference to the fact whether the road crosses or touches their lands.

That an appeal lies to the circuit court from an order of the county court refusing to establish a road was held by this court in *Cox v. Dake*, 34 Mo. App. 80. That an appeal lies by a remonstrant from an order vacating a road was likewise held by this court in *In re Webster*, 36 Mo. App. 355. It was held by the supreme court under the Revised Statutes, before the enactment of the road law of 1887, that such an appeal lies by a remonstrant from an order opening a road. *State ex rel., etc., v. County Court*, 80 Mo. 500. Our reasons for holding that an appeal does lie in such a case were fully stated in *Cox v. Dake*, *supra*, and, although we are asked to reconsider the question, we do not deem it necessary to enlarge upon those reasons here. They briefly are, that, by section 1102 of the Revised Statutes of 1879, an appeal is given from the judgments and orders of the county court to the circuit court in all

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cases not expressly prohibited by law; that there is not only no express prohibition of such an appeal in a case relating to the opening or vacating of a public road in any statute of which we have knowledge, but that, on the contrary, such an appeal is distinctly recognized by section 10 of the road law of 1887. Acts of 1887, p. 248.

By section 1210 of the Revised Statutes of 1879, "in all cases of appeal from the final determination of any case in a county court, such appeals shall be prosecuted to the appellate court in the same manner as is now provided by law for the regulation of appeals from justices of the peace to circuit courts," etc. The provision of the same statute relating to appeal from justices of the peace to the circuit courts gives such an appeal to "any person aggrieved." R. S. 1879, sec. 3039. In view of these provisions it cannot be doubted that the remonstrants in a proceeding to vacate a road, who are unsuccessful and who are condemned to pay the costs, are "aggrieved" in such a sense as to entitle them to prosecute the appeal to the circuit court which is given by other statutory provisions. The statute, then, gives no special rights to the freeholders whose lands are crossed or touched by the road sought to be vacated except the right to a personal notice; it pays this deference, and this alone, to their peculiar situation in respect of the road; but it allows all other freeholders of the township or townships through which the road runs, in number exceeding twelve, both to petition for its vacation and to remonstrate against such petition. Any construction which would deny to remonstrants, other than those whose lands are crossed or touched by the road, the right to appeal, would, by parity of reasoning, deny the right to petitioners whose lands are not so crossed or touched. It is plain to us that such is not the intention of the law.

We, therefore, hold that in a proceeding to vacate a county road, under section 29 of the road law of 1887,

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an appeal lies by the remonstrants, being twelve or more in number, from an order of the county court vacating the road, to the circuit court, although the lands of none of such remonstrants are crossed or touched by the road sought to be vacated, and that the appeal accordingly lay in this case, and that the circuit court hence had jurisdiction. But we find that the Kansas City Court of Appeals, in the case of *Aldridge v. Spears*, *post*, p. 527, have taken a different view of this question, and have certified their decision to the supreme court for final determination, as being in conflict with our decision in *Cox v. Dake*, 34 Mo. App. 80. We, therefore, take the same course with this case, and order that it be certified to the supreme court for final determination, in conformity with the constitutional mandate. All the judges concur.

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40	367
52	648
53	491
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59	586
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61	433

THE MONROE CITY BANK, Defendant in Error, v. JAMES T. FINKS AND GEORGE P. MUDD; JOHN H. FINKS, Attaching Creditor, Plaintiff in Error.

St. Louis Court of Appeals, April 1, 1890.

Practice, Appellate: NECESSITY FOR BILL OF EXCEPTIONS. A motion is not a part of the record of a cause, unless it is made so by a bill of exceptions, nor can a ruling upon it be reviewed, if it be not incorporated in the bill of exceptions; and this applies to a motion by an attaching creditor for leave to defend a prior attachment proceeding against the attachment debtor.

Writ of Error to the Monroe Circuit Court.—HON. THOS. H. BACON, Judge.

AFFIRMED.

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Bristow & Lighter, for the plaintiff in error.

The attaching creditor complains of the action of the trial court in overruling his motion to be allowed to appear and defend, the court holding that the motion came too late, but the attaching creditor is not entitled to appear until the attached debtor makes default. R. S. 1879, sec. 570; *Engel v. Dussel*, 26 Mo. App. 39.

D. G. Davenport and *A. M. Alexander*, for the defendant in error.

There is no evidence before this court that plaintiff in error asked to be made a party in this cause. If any such motion was made, it is not a part of the record, and as there has never been any bill of exceptions made or filed in this cause, this court has no evidence of the filing of any such motion. Although the clerk may have inserted what purports to be a motion in the transcript, it is no part of the record, for it is inserted contrary to rule 13 of this court, and is not thereby made any part of the record in this cause. *Butler v. Thomas*, 36 Mo. App. 105; *McNeil v. Ins. Co.*, 30 Mo. App. 306; *State v. Swiney*, 68 Mo. 96; *Bollinger v. Carrier*, 79 Mo. 318; *Shaughnessy v. St. Louis*, 7 Mo. App. 591; *Berkly v. Kobes*, 13 Mo. App. 502; *State v. Batchelor*, 15 Mo. 208; *State v. Marshall*, 36 Mo. 400. There is no evidence of a motion for a new trial or in arrest of judgment in the refusal of the court below to permit John H. Finks to defend for James T. Finks. Such motions can only appear by bill of exceptions. *Butler v. Thomas*, 36 Mo. App. 105; *McNeil v. Ins. Co.*, 30 Mo. App. 306, and authorities above cited. If the paper copied into the transcript by the clerk be treated as a motion properly in the record in this case, then there is not a particle of evidence that John H. Finks was an attaching creditor of James T. Finks, or

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that he had the same property attached that had been attached by defendant in error. The fact that it is alleged in what is claimed to be the motion that John H. Finks was an attaching creditor of James T. Finks is no evidence of the fact so alleged. *State v. Carter*, 98 Mo. 176, 181; *Helm v. Gore*, 65 Mo. 430; *Bartlett v. Draper*, 3 Mo. 487; *Knox v. Sikes*, 15 Mo. 235

THOMPSON, J., delivered the opinion of the court.

There is no bill of exceptions in this record; but the record proper and certain other entries which the clerk of the circuit court has seen fit to copy into the transcript show that an action was begun by attachment by the Monroe City Bank against James F. Finks and George P. Mudd, on two promissory notes; that the attachment was levied upon certain real property and that there was an order of publication; that on the fourth day of November, 1889, there was a judgment by default and a final judgment for the plaintiff; that on the sixth day of November, 1889, John H. Finks filed a motion, reciting that he was an attaching creditor of James T. Finks, and asking that the judgment be set aside, and that he be permitted to come in and defend,—which motion was by the court overruled on the same day; and that, on the seventh of November, John H. Finks filed a motion in arrest of the judgment, so called, dismissing his petition to be allowed power to defend, which was also overruled. To reverse this ruling, John H. Finks prosecutes this writ of error.

The record proper in this case consists of the petition, the writ of attachment, the sheriff's return thereon, the order of publication and the entry of judgment. See *Bateson v. Clark*, 37 Mo. 31, 34; *Richardson v. George*, 34 Mo. 104. There the record ends. The other matters above disclosed form no part of the record proper; and, although the clerk has seen proper to copy them into the transcript, we cannot look to

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them for any purpose, in accordance with decisions so numerous and so often repeated that we ought not to be expected to cite them. It is a settled rule of appellate procedure in this state that no *motion* forms a part of the record, unless it is made such by being incorporated in a bill of exceptions. *Butcher v. Keil*, 1 Mo. 262; *United States v. Gamble*, 10 Mo. 457; *State v. Wall*, 15 Mo. 208; *St. Louis v. Milligan*, 18 Mo. 181; *Christy's Adm'r v. Myers*, 21 Mo. 112; *Kohn v. Lucas*, 17 Mo. App. 29; *Robinson v. Suter*, 15 Mo. App. 599; *Ober v. Railroad*, 13 Mo. App. 81; *Bank v. Fletcher*, 15 Mo. App. 272; *State v. Gee*, 79 Mo. 313. So, as to motions for new trial and in arrest of judgment. *State v. Marshall*, 36 Mo. 400; *Powell v. Bevin*, 11 Mo. App. 220; *McNeil v. Ins. Co.*, 30 Mo. App. 306, and cases there cited; *Puller v. Thomas*, 36 Mo. App. 105.

In this case there is no evidence before us that any motion was made, for this could only be shown by a bill of exceptions. There is no evidence that any exception was taken to the overruling of the same, if made; for, assuming that the so-called motion in arrest could be treated as an exception, there is no evidence that this was filed and overruled, since *it* is not shown by a bill of exceptions.

But the plaintiff in error seeks to take the case out of the operation of this rule by the suggestion that such a motion in writing to be allowed to come in and defend is in the nature of a petition, and not a mere motion. We are not of this opinion. It is not in any sense the foundation of any independent proceeding. It is simply a mode of moving the court for the privilege which the statute accords to other attaching creditors, where the defendant neglects to defend the action (Revised Statutes, 1889, section 570), and which the court may "in its discretion" grant or refuse. R. S., sec. 576. The motion in a proceeding under the statute

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by a judgment creditor of a corporation against a stockholder is much more nearly a petition, because it is the foundation of an independent supplementary proceeding; and yet it is held that such a motion must be shown by a bill of exceptions. *Kohn v. Lucas*, 17 Mo. App. 29.

But what would be gained by the argument, if it were a petition? It does not prove itself, and the burden of proof is on the petition. The mere fact of the filing of the petition, and of its being overruled by the court, is not even evidence that the petitioner is an attaching creditor. We cannot speculate upon the reasons why the court overruled it, nor decide whether or not it was filed in time, since the court may not have overruled for any other reason than that no evidence was offered in support of its allegation that the petitioner was an attaching creditor.

The order of the circuit court will be affirmed. All the judges concur.

MECHANICS AND TRADERS' BANK, Appellant, v. GLASER BROS., Garnishees of D. H. DOWNS *et al.*, Respondents.

St. Louis Court of Appeals, April 1, 1890.

Costs: STENOGRAPHER'S FEE. A garnishment proceeding is not "a case" within the meaning of the act of 1887 for the taxation in every case of a stenographer's fee of three dollars, and such fee is accordingly not taxable as costs in such a proceeding.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

David Goldsmith, for the appellant

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THOMPSON, J., delivered the opinion of the court.

The question for decision upon this record is, whether the fee of three dollars allowed by section 4 of the act of March 31, 1887 (Laws of 1887, page 146), can be taxed, in a proceeding by garnishment, as though it were a separate suit. The circuit court held that it could be so taxed, and the plaintiff has appealed from the decision. We are of opinion that it cannot be so taxed. Section 3 of the act provides for the payment of a salary to the court stenographers therein provided for, and also allows them compensation for writing long-hand transcripts of their notes. Section 4 is as follows: "In every case (except in suits by the state for the collection of delinquent taxes), now or hereafter pending in any circuit court or division thereof, where an official stenographer is appointed, the clerk of said court shall tax up the sum of three dollars, to be collected as other costs, and thereupon to be paid by said clerk to the city treasurer to apply to the payment of salary of such stenographers as above." This court is of opinion that a proceeding by garnishment in an attachment suit is not a "case" within the meaning of the above statute. That it is a mere auxiliary proceeding, depending on the principal proceeding in which it is instituted, is abundantly shown by the statute creating and defining it. R. S. 1879, sec. 2531. It is not a suit or separable controversy within the meaning of the acts of congress allowing causes to be removed from the state courts to the federal courts. *Weeks v. Billings*, 55 N. H. 371; *Pratt v. Albright*, 9 Fed. Rep. 634; *Buford v. Strother*, 10 Fed. Rep. 406; *Poole v. Thatcherdeft*, 19 Fed. Rep. 49. The right of costs is entirely conferred by statute. It is contrary to the policy of the law to enlarge such statutes by loose construction so as to build up constructive fees, since, as experience shows, the practice of taking

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these fees has a tendency to grow insensibly, even where the courts construe the statutes granting them strictly.

The order appealed from will be reversed and the cause remanded. All the judges concur.

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86	342
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88	141
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95	39

JOEL M. SAULSBURY, Respondent, v. D. J. CORWIN *et al.*, Appellants.

St. Louis Court of Appeals, April 1, 1890.

1. **Negotiable Instruments:** RIGHT OF ACTION. One who holds a promissory note for collection may sue upon it in his own name, subject to the right of any defendant to make any defense which he could make against the real owner.

2. **Married Women:** ESTOPPEL. The fact, that a promise made by a married woman has been acted upon by the promisee, does not estop the married woman from denying the validity of the promise on the ground of her inability to contract.

3. ——— : CONTRACTS. A married woman cannot by ratification or renewed promises render effective a promise, which was made by her while she was unmarried, but which did not become binding on her prior to her marriage.

Appeal from the Scotland Circuit Court.—HON. BEN. E. TURNER, Judge.

AFFIRMED.

McKee & Jayne, *F. M. Harrington* and *John Smoot*, for the appellants.

(1) This action is not prosecuted in the name of the real party in interest, as required by statute. R. S. 1889, sec. 1990; *Grocery Co. v. Crow*, 36 Mo. App. 295. (2) If it be true as stated that plaintiff had no interest in the note, that it was not his, that he paid nothing

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for it, that it was his mother's, then the demurrer to the evidence asked by appellants should have been sustained. *Noeninger v. Vogt*, 88 Mo. 590; *Wilson v. Board of Ed.*, 63 Mo. 140; *Buesching v. Gaslight Co.*, 73 Mo. 219. Mrs. Lancaster, her husband and attorney induced the makers of the one-hundred-dollar note, on day of sale, not to bid, under a promise that if they would not, and let her buy the land, she would pay off the one-hundred-dollar note, and should be estopped. *Cottrell v. Spiess*, 23 Mo. App. 35; *Martin v. Johnson*, 23 Mo. App. 96. This note was not transferred in writing with the assent of the wife. R. S. 1889, sec. 6869; *Broughton v. Brad*, 94 Mo. 169; *Gilliland v. Gilliland*, 96 Mo. 522; *Rieper v. Rieper*, 79 Mo. 352. Nor can the husband dispose of the proceeds of the sale of her real estate. *Rogers v. Bank*, 69 Mo. 560. Nor of its products. *Houx v. Shaw*, 25 Mo. App. 233.

T. H. Wagner, for the respondent.

Thompson, J., delivered the opinion of the court.

This action was commenced before a justice of the peace on the following promissory note:

"$216.75. Memphis, Mo., August 31, 1887.

"Four months after date, for value received, we promise to pay to the order of Alexander Lancaster two hundred and sixteen and seventy-five-hundredths dollars, with interest at the rate of ten per cent. per annum from maturity; and if the interest be not paid annually to become as principal, and bear the same rate of interest. The signers and indorsers, each, waive demand, notice and protest of this note. Payable at Citizens' Bank. D. J. Corwin,

"Anselm Corwin,

"William Purvis.

"I hereby assign this note to Joe Saulsbury without recourse on me. April 14, 1888.

"Alex. Lancaster."

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There were certain credits indorsed on the note, over the signature of Alex. Lancaster, which need not be considered.

In the circuit court the defendants filed the following amended answer:

"Now come the defendants, and for amended answer state that D. J. Corwin is the principal in said note, and the other defendants are his securities. Defendants further answering say that plaintiff has no interest in the subject-matter in this suit; said note does not belong to him; that he is not the owner of the same in good faith and for value. Defendants further answering say, that one John Saulsbury, who is now dead, at the time of his death was justly indebted to one Philip Purvis, in the sum of one hundred and six dollars, with ten per cent. interest thereon from September 11, 1886, agreeable to a promissory note, filed with the original answer herein; that said note, given by said John Saulsbury, was signed by said John Saulsbury, as principal, and C. A. Crowley and W. P. Browning as securities, and had been duly proved against the estate of said John Saulsbury; that, after that, said payee in the note, herein filed and sued on, and his wife, who was the widow of said John Saulsbury, agreed with Philip Purvis and C. A. Crowley and W. P. Browning, that they would pay this note, and said agreement was had and made for a good valuable consideration, and it was further agreed by said Lancaster and said Lucinda Lancaster that said notes should be paid by defendant, D. J. Corwin, and should be an offset against the note due by him, D. J. Corwin; and defendants, further answering say, that the defendant, D. J. Corwin, is now the owner of said note given to said Purvis, and that the same is a valid, subsisting claim, which he pleads as a set-off to said note sued on. Defendants further answering say said note is paid off and discharged and that nothing is due on same. Wherefore he prays judgment."

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A trial anew before a jury resulted in a verdict and judgment for plaintiff for the amount due on the note, and against the defendants on the above set-off, and from this judgment the defendants prosecute the present appeal to this court.

I. The first assignment of error is that the court should have sustained the demurrer to the evidence, because it appeared that the plaintiff had no interest in the note. It did appear from the plaintiff's testimony that he had no interest in the note, except that it had been assigned to him for collection by his step-father, Alex. Lancaster, and that his mother, Lucinda Lancaster, was the real owner of it. This assignment of error is not well taken. One who holds negotiable paper for collection merely may sue on it in his own name, subject, of course, to all defenses against the real owner. *Cummings v. Kohn*, 12 Mo. App. 585. Whether or not Mrs. Lancaster, the real owner of the note, assented *in writing* to this transfer by her husband, who was the payee named therein, as required by Revised Statutes, 1889, section 6869, is a question which the defendants cannot raise for her, nor for themselves, in order to avoid the payment of the note.

II. The defendants offered to prove, in substance, that, at a public sale of the home place, left her by her former husband, John Saulsbury, the plaintiff's mother, being then remarried with Mr. Lancaster, promised certain persons, not parties to the note here sued on, who were bidding at the sale, that, if they would not bid against her at the sale, she would pay off the note of her former husband, spoken of in the amended answer, on which they were security; that they thereupon ceased bidding, and that the property was, in consequence, struck off to Mrs. Lancaster at much less than its real value. This evidence was properly excluded, because it was an attempt to prove the contract of a married woman, which is void at law, and to make it the foundation of an offset. Nor is there any force in so much

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of the defendant's argument upon this point as appeals to the principle of *estoppel. Estoppels in pais* are frequently raised against married women; but this rests on the ground that their coverture does not clothe them with immunity from the consequences of their own fraud. Any argument founded on the principle of estoppel, which would make the promise of a married woman good, because the promisee had acted upon the faith of it, would destroy the rule which places her under the disability of making contracts; since every promise made by her, when acted upon by the promisee, would become, though void as a contract, good as an estoppel.

III. But the defendants also made a tender of evidence, which the court rejected, to the effect that, while yet a widow, and before her remarriage with Mr. Lancaster, the plaintiff's mother had made a similar promise to the defendant Corwin, and to the third parties named in the preceding paragraph. This point has been argued as though Mrs. Lancaster has in some way ratified this promise by what took place at the sale, as stated in the preceding paragraph. It is scarcely necessary to suggest that, if a married woman has made a promise while discovert, which is not binding upon her unless ratified, she cannot ratify it after she has become covert; for the power to ratify necessarily supposes the power to contract. On the contrary, the true view is that, if Mrs. Saulsbury, while a widow, made the promise which the defendants attempted to prove, her subsequent marriage with Mr. Lancaster had the effect in law to revoke it, since it had not been *executed* by the promisees when her subsequent marriage took place. Thereafter, if they acted upon her promise to their loss (excluding the case of a promise capable of being made a charge on her separate estate in equity), they place themselves in the ordinary situation of any person who acts on the promise of a married woman; they are bound to know the law—to know that such a

promise is void in law—that it will not be binding on her, as the foundation of an action or of a counter-claim, either as a promise or by way of estoppel.

The court was clearly right in these rulings. This renders it unnecessary to consider the further question whether the defendants made any further tender of evidence, tending to show that this promise of Mrs. Lancaster to pay off another note given by her former husband, to which note these defendants were not parties, inured in any way to their benefit,—as, for instance, to inquire whether, when the defendant Corwin bought this note, if he did buy it, he also bought Mrs. Lancaster's parol promise to pay it. As no other defense was offered against the payment of the note sued on, the court properly instructed the jury to find for the plaintiff.

The judgment will be accordingly affirmed. It is so ordered. All the judges concur.

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In the Matter of THE FINAL SETTLEMENT OF BARBARA A. TYLER, Guardian, etc., Respondent, v. GEORGE L. CARTWRIGHT AND MARY L. CARTWRIGHT, Objectors, Appellants.

St. Louis Court of Appeals, April 1, 1890.

1. **Dower.** When a widow elects to take an undivided share of her husband's estate under the provisions of his will, she will not be entitled to quarantine under Revised Statutes, 1879, section 2205.

2. **Tenants in Common:** ACCOUNTABILITY. When one of several co-tenants, who occupies the whole of the realty held in common, holds a position of trust towards one of his co-tenants, as if he be guardian of the person and estate of such co-tenant he is accountable to such co-tenant for the latter's share of the reasonable rental value of the realty during such occupancy; the liability resting on his obligation to make his ward's property productive.

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3. **Judgment:** RES ADJUDICATA. When several persons acquire realty as tenants in common under a will, and one of the tenants in common is both executrix of the will, and guardian of the person and estate of one of her co-tenants, a final settlement made by her as such executrix, in which she does not charge herself with the rental value of the realty during her occupancy thereof, is not *res adjudicata* as to a claim of her ward for a share of such rental value, for which she is liable in her capacity as guardian owing to her obligation, as such, to render her ward's estate productive.

4. ——— : ———. Neither will the judgment in a suit for the partition of the realty, in which no claim for such rental value was made, debar the ward from claiming her share of such rental value from her guardian, though she and her guardian were parties to the suit, and she was of age at the time of the partition.

5. **Guardian and Ward:** PENAL INTEREST. When a guardian fails to charge herself with the share of the ward of the rental value of realty owned in common by the guardian and ward, but occupied exclusively by the guardian, and where the guardian in so doing does not act out of bad faith, the guardian should not be charged by way of punishment with the highest interest, compounded; interest, in such case, should only be allowed so far as requisite to compensate the ward for the loss suffered.

Appeal from the St. Charles Circuit Court.—Hon. W. W. Edwards, Judge.

Reversed and remanded.

Lackland & Wilson, for the appellants.

(1) Barbara A. Tyler had no quarantine in the home place under section 2205, Revised Statutes, 1879. She was a devisee under her husband's will and a tenant in common with her ward and the other devisees, and liable for said rents. R. S. 1879, secs. 2199, 2200; *Wigley v. Beauchamp*, 51 Mo. 544, 547; *Griffith v. Canning, Ex'r*, 54 Mo. 282; *Matney v. Graham*, 50 Mo. 560; *Collins v. Warren*, 29 Mo. 236, 240; *Dougherty v. Barnes*, 64 Mo. 159; *Gant v. Henley*, 64 Mo. 162. (2) The guardian was derelict and grossly neglectful of her ward's interests, and is liable for the highest rate of interest, compounded with annual rests.

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R. S. 1879, sec. 2599; *Taylor v. Hite*, 61 Mo. 142; *Payne v. King*, 38 Mo. 502; *In re Davis, Ex'r*, 62 Mo. 450; *Frost v. Winston*, 32 Mo. 489, 495; *State to use v. Richardson*, 29 Mo. App. 595. (3) The rents in question were not *res judicata* either in said partition suit, or in the final settlement of Spencer C. Tyler's estate. This is shown both by the records of those cases and the agreed statement of facts. *Hickerson v. City of Mexico*, 58 Mo. 61 and authorities cited in the opinion on page 65; *Wright v. Salisbury*, 46 Mo. 26; *Wells v. Moore*, 49 Mo. 229; *Spradling v. Conway*, 51 Mo. 51; *Hull v. Lyon*, 27 Mo. 570. (4) The ward, or her heirs, in this case, can go behind the partition suit and final settlement of her father's estate, even if the rents in question had been adjudicated in those cases, or either of them. *In re Final Settlement of Wood*, 71 Mo. 623, 626.

T. F. McDearmon, for the respondent.

(1) The judgment of the circuit court should be affirmed because the rents and profits were *res adjudicata* in the partition suit between the heirs of Spencer C. Tyler. *Spitts v. Wells*, 18 Mo. 471; *Forder v. Davis*, 38 Mo. 107; *Ragan v. McCoy*, 29 Mo. 356; Freeman on Co-Tenancy and Partition, sec. 274, *et seq.* (2) The question of rents was *res adjudicata* in the final settlement of Barbara A. Tyler, executrix of Spencer C. Tyler's estate. This same party in that settlement sought to charge the same Barbara A. Tyler with these rents, but failed. *McKinney v. Davis*, 6 Mo. 501; *Whittelsey v. Dorsett*, 23 Mo. 236; *Kennerly v. Shepley*, 15 Mo. 649; *Jones v. Brinker*, 20 Mo. 87; *Dullard v. Hardy*, 47 Mo. 404; *Julian v. Calkins*, 85 Mo. 202; *Crispen v. Hannavan*, 50 Mo. 415; *Strong v. Ins. Co.*, 62 Mo. 289; *Cooley v. Warren*, 53 Mo. 156; *Wood v. Ensel*, 63 Mo. 193. "Final settlements by administrators and executors have the force and effect of judgments and are conclusive on all persons, the heirs included,

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until reversed by appeal or impeached for fraud." *Caldwell v. Rockridge*, 9 Mo. 362; *Barton v. Barton*, 35 Mo. 158; *Murray v. Roberts*, 48 Mo. 307; *Pecot v. Bates*, 47 Mo. 390; *Clyce v. Anderson*, 49 Mo. 37; *Lewis v. Williams*, 54 Mo. 200; *Sheetz v. Kirtley*, 62 Mo. 417; *State to use v. Roland*, 23 Mo. 90; *Van Bibber v. Julien*, 81 Mo. 618. (3) The premises for which rent is claimed constituted the homestead or mansion-house of Spencer C. Tyler at the time of his death, and his widow, Barbara A. Tyler, was entitled to remain in and enjoy them after his death until her rights as his widow were assigned. R. S. 1889, sec. 4533; *Holmes v. Kring*, 93 Mo. 452; *Orrick v. Pratt*, 34 Mo. 226.

THOMPSON, J., delivered the opinion of the court.

This is an appeal from the decision of the circuit court, upon an appeal from the probate court disallowing exceptions to the final settlement of a guardian. The case is presented upon a long agreed statement of facts, which it is not necessary to set out, as the sole question in contest is whether the guardian should have charged herself with her ward's proportion of the rents of the so-called "home place" during the period of about ten years, which elapsed between the death of the husband of the guardian and father of the ward, and a decree in partition.

Mrs. Barbara A. Tyler, the guardian, took one-half of the estate of her deceased husband under his will. There were eight children, one of whom was Mary L. Tyler. Mrs. Tyler was appointed guardian of her minor child, Mary L. Tyler, and also of her other children, in 1870. She continued to reside on the home place, consisting of eight hundred and six acres, from the death of her husband in 1868 until the year 1878, when by a decree of partition the home place was allotted to her as her share under the will, the children taking other portions of their father's estate. Thereafter she continued to reside on the home place, and she

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resides there at the present time. In 1877, Mary L. Tyler intermarried with the objector, George L. Cartwright. It is but just to draw attention to the fact that this is not an unfilial contest by a daughter against her mother, but that Mrs. Cartwright died in 1880, leaving two children born of her marriage with George L. Cartwright, one of whom subsequently died. In 1886, Mrs. Tyler filed her final settlement as guardian of her daughter, Mary L., and objections thereto were filed by the son-in-law, George L. Cartwright, joining the surviving granddaughter, Mary L. Cartwright.

During all this time, and even for a year subsequently to her marriage, the daughter, Mary L., lived with the mother and guardian upon the home place. Mrs. Tyler never rented out the whole or any portion of the home place, and never received any rent therefor from a third person; but she did make some additions to the family residence. In 1880, she filed her exhibit for final settlement *as executrix* under the will of her late husband in the probate court, and the present objectors, together with Hardinia B. Martin and her husband, objected to the final settlement, for the reason, among others, that she had failed to charge herself with the rents of the home farm from February, 1868, the date of the death of her husband, to March, 1878, the date of the partition; and this question, which is precisely the same question as that presented in the present case, except that it arose on her settlement as executrix, instead of guardian, was presented to the probate court and adjudicated against the objectors.

Upon these facts three questions have been presented for our decision: *First.* Whether Mrs. Tyler, by virtue of having taken under her husband's will, and not in virtue of her rights of dower or homestead, took as tenant in common with the children; and, if so, whether she became liable to account to her daughter, Mary L. Tyler, for her share of the rents and profits of the home place during the period in question.

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Second. Whether this question was conclusively adjudicated in the partition proceeding. *Third.* Whether it was conclusively adjudicated on the exceptions to her final account as executrix.

I. We hold that, under the decision of the supreme court in *Wigley v. Beauchamp*, 51 Mo. 544, Mrs. Tyler, became, by virtue of her acceptance of the provisions of her husband's will, seized of an undivided one-half interest in the home place, as a tenant in common with her daughter, Mary L., who became seized of an undivided one-sixteenth interest. We further hold that, in this character, Mrs. Tyler was not entitled to quarantine, under section 2205 of the Revised Statutes, 1879.

We are with the learned counsel for the respondent that it was decided by the supreme court of this state in *Ragan v. McCoy*, 29 Mo. 356, 367, that, where one tenant in common occupies the whole estate, without any claim on the part of his co-tenants to be admitted into possession, and without hinderance by him of such possession, he is not liable to his co-tenants in an action of account. "Each tenant," said SCOTT, J., "is entitled to the possession, and may enter and enjoy if he will. As each tenant is entitled to his share of every part of the undivided premises, one tenant cannot gain an exclusive right to any part of them. He may enter and enjoy a portion less than his share, yet the other tenants will be entitled to their share of that portion, as each tenant is seized of his portion of every part of the undivided premises; so that, if the law were otherwise, one tenant might refuse to enter, and the other could not enjoy any portion, even one less than his share, without making himself liable to the others for a share of the profits, and that without regard to the fact whether the occupation was beneficial or otherwise to the premises. Of course, if one co-tenant ousts another, he will be liable in an ejectment, or subject himself to the law of forcible entries. But where the land is free

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to all, and each may enter if he will and enjoy his rights undisturbed, there is no reason in compelling him, who does enter, to pay rent to him who neglects or obstinately refuses to do so." This decision created a rule of property in this state, which has never been overruled or disturbed by any subsequent case. It was grounded on principles of the common law, which were not disturbed by the statute of Anne, giving one tenant in common a right of action against his co-tenants, and it expresses the prevailing American doctrine. Freeman on Co-Tenancy and Partition, secs. 275, 258; *Pico v. Columbet*, 12 Cal. 414, 420; *Goodenow v. Ewer*, 16 Cal. 461; *Bird v. Bird*, 15 Fla. 424; *Crane v. Waggoner*, 27 Ind. 52; *Scantlin v. Allison*, 32 Kan. 376; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh (Ky.) 141; *Bridgford v. Barbour*, 80 Ky. 529; *Israel v. Israel*, 30 Md. 120, 126; *Sargent v. Parsons*, 12 Mass. 153; *Shepard v. Richards*, 2 Gray, 424; *Woolever v. Knapp*, 18 Barb. 265; *Dresser v. Dresser*, 40 Barb. 300; *Wilcox v. Wilcox*, 48 Barb. 327; *Scott v. Guernsey*, 60 Barb. 163; *Osborn v. Osborn*, 62 Tex. 495. There are statutes in some states and decisions in others, which make the occupying co-tenant liable to account in such cases; but we need not consider them, in view of the fact that the rule is settled otherwise in this state. The true distinction is between the cases where one of the co-tenants *occupies* and *uses* the common estate, which was the case here, and the case where one co-tenant collects rent from a *third party* for the use and occupancy of the common estate. While he is not liable to account to his co-tenant in the former case, he is in the latter. Freeman on Co-Tenancy and Partition, sec. 273; *Pope v. Harkins*, 16 Ala. 324; *Barnum v. Landon*, 25 Conn. 152; *Huff v. McDonald*, 22 Ga. 161; *Crow v. Mark*, 52 Ill. 332; *Scantlin v. Allison*, 32 Kan. 276; *Bridgford v. Barbour*, 80 Ky. 529; *Buck v. Spofford*, 31 Me. 34; *Gowen v. Shaw*, 40 Me. 56; *Moses v. Ross*, 41 Me. 360;

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Shepard v. Richards, 2 Gray, 424; *Sargent v. Parsons*, 12 Mass. 149; *Izard v. Bodine*, 11 N. J. Eq. 403; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Osborn v. Osborn*, 62 Tex. 495.

But, after taking such pains to examine the cases in which this principle has been applied, we can find none which applies it to such a case as the one before us; nor do we find that it has been applied in any case where the tenant in common, sought to be charged, occupied a position of *trust* towards his co-tenant in respect of the common property. A guardian of the person and estate of a minor is, by our statute (Revised Statutes, 1879, sec. 2578), vested with full care and management of the estate of the minor, subject to the superintendence of the probate court. It is as plainly the duty of the guardian to rent out the real estate of his ward, or otherwise so manage it as that it will yield an income to him, as though the statute required him so to do in express terms. If a partition is necessary in order to enable the guardian to do this, the guardian should seasonably institute a proceeding for such partition. If the guardian, being himself a tenant in common with the ward of his estate, neglects to do this, but enjoys the full use of the estate for his own purposes, it is just and right that he should be required to account, on final settlement, for the reasonable value of the use of the ward's undivided interest. This is especially true where, as in this case, the guardian, although standing in the relation of parent to the ward, charges the ward with board during the entire period of her minority. It is true that the mother of an infant is not, like the father, bound in law for its support, but may charge the cost of its support upon its estate, where it has an estate. But a mother should not be allowed to do this, and at the same time enjoy the full benefit of the ward's estate, without accounting in any way to the ward therefor.

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II. We next come to consider whether the matter in controversy under this exception became *res adjudicata* by reason of having been contested upon the final settlement of Mrs. Tyler *as executrix* of the estate of her deceased husband. In that proceeding Mrs. Tyler was not accounting in her character of guardian at all. Her relation to the real estate of her deceased husband in her character of executrix was entirely different from her relation to the real estate of her ward in her character of guardian. As executrix she had the limited power, under the direction of the probate court, to lease the real estate for not more than two years at a time (Revised Statutes, 1879, section 129; *Lass v. Eisleben*, 50 Mo. 122), and to make repairs thereon, if ordered by the court. R. S., sec. 131. Aside from the fact that it does not appear that she was ever ordered by the probate court to take possession of, and lease out, the real estate in her character of executrix, it is sufficient, for the purpose of disposing of this argument, to say that she was accounting in that settlement in a different character and in respect of a different trust; and that the issues, so to speak, could not have been the same on that accounting as on the present, for which reason that final settlement could not operate as a bar to the exception to her final settlement as guardian in the present case.

III. A closer question is presented by the objection that, as the question of liability for prior use of the real estate might have been adjusted in the proceeding for partition, the judgment in that proceeding concludes a reopening of the question in this. It was on this ground that the learned judge in the circuit court decided the cause against the exceptors. It has been held that a judgment in partition is *res adjudicata* as to any claim for *improvements*, made by one of the tenants in common prior to the proceeding in partition. *Spitts v. Wells*, 18 Mo. 468. The principle of this decision seems to be that a proceeding for partition is

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still so far an equitable action, that the court has power to adjust equities between the co-tenants in respect of the land, and that equities not so adjusted cannot be made the foundation of a subsequent action, because this would be tantamount to allowing an action to reform the judgment in partition. We assume that this principle would apply in ordinary cases, so that a decree in partition would ordinarily conclude a subsequent action by one of the co-tenants against another for the use and occupancy of the premises prior to the partition proceeding. But we are not clear that it applies to a case where the parties, who have been tenants in common, have sustained the relation of guardian and ward to each other. When these partition proceedings took place the former ward, Mary L. Tyler, had been of age about two years. If she had any claim against her mother of any equity growing out of the prior occupancy of the land, it could only have been either in the relation of tenant in common, or in the relation of guardian and ward. In the relation of tenant in common she had no claim which was valid in law, because, as already seen, one co-tenant is not liable to another co-tenant for the exclusive occupancy of the common land, except where he rents it out, and collects rents for it. Suppose, then, that Mary L. Tyler had undertaken to set up, in the partition suit, that her mother was liable to her as guardian for not procuring a partition of the common land and renting out Mary L. Tyler's portion of it and accounting to her for the rents, would it not have been a perfectly valid answer to say, "I am accountable to you for that, if at all, in my settlement as guardian?" We think it would, and that it would have been quite incongruous to try to make the mother account in the partition proceeding for the non-fulfillment of her trust as guardian. We, therefore, think that this matter could not have been litigated in the partition proceeding, and, as it was not so litigated, we sustain this assignment of error.

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From what has already been said, it will follow that, under no circumstances, will Mrs. Tyler be liable to account for the use and occupancy of the common property after the ward became of age.

IV. We do not, however, agree with the learned counsel for the exceptors, that this guardian ought to be charged with the highest rate of interest, compounded at annual rests. That it is proper so to charge a guardian, who has for a long time had possession of his ward's money without lending it out at interest or accounting for it, seems to be as far as the cases go which have been cited in support of this argument. Where the guardian is a widow and the mother of the ward, and merely occupies the home place with the ward, under the home roof with her, without proceeding for a partition, or making annual settlements as guardian, a thing which a widow would be very apt to do in perfect innocence, if she were not carefully advised, it seems that the rule, under which she should be charged for failing to make profitable use to the ward of her estate, is the rule in *Cruce v. Cruce*, 81 Mo. 676, the rule of compensation to the ward rather than of punishment to the guardian.

The judgment will be reversed and the cause remanded. It is so ordered. All the judges concur.

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THE LAFAYETTE MUTUAL BUILDING ASSOCIATION, Respondent, v. ALOIS KLEINHOFFER AND CASPAR STOLLE, Appellants.

St. Louis Court of Appeals, April 1, 1890.

1. **Practice, Appellate:** POINTS NOT RAISED IN TRIAL COURT. Neither a defense based upon the statute of frauds, nor an objection to the right of the appellee to explain an ambiguity in a writing by parol evidence, can be urged on appeal, when the record does not show that the point was raised in the trial court.

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2. ——: ERROR INDUCED BY THE APPELLANT. Nor is error assignable by an appellant with respect to an instruction to the jury, or a course of ruling by the trial court, which was in accordance with the theory on which he tried the cause.

3. **Evidence**: IN AID OF CONSTRUCTION OF WRITTEN CONTRACT. When the meaning of a contract in writing is doubtful, resort may be had to the circumstances under which it was given, to ascertain the same.

4. **Principal and Surety**: CONSIDERATION. An agreement, whereby one binds himself as surety for the performance by a contractor of a contract for the erection of a building, is invalid, if it is made after such contract has been entered into between such contractor and the party contracting with him, and without any new consideration.

5. **Witness**: COMPETENCY. In an action upon a contract, brought by the assignee of one of the contracting parties, who is dead, against the other contracting parties, such other contracting parties are not competent witnesses in relation to the contract, owing to the death of the one party.

6. ——: ——. The deposition of one of several contracting parties, though in relation to the matter of contract, is not rendered incompetent as evidence by the death of another of the contracting parties after the taking of the deposition.

7. **Principal and Surety**: MECHANIC'S LIEN. The surety for the performance on the part of the contractor of a contract for the erection of a building is liable for the costs properly taxed in a suit for the establishment of a mechanic's lien; but also *held* (THOMPSON, J., *dissenting*) that such liability will not extend to costs incurred in the advertisement and sale of the property subjected to lien, since these could have been avoided by payment of the lien, when established by the judgment.

8. ——: ——: PRESUMPTIONS. The costs taxed in the suit for the establishment of such lien are *prima facie* correct.

9. ——: ——: JUDGMENT AGAINST PRINCIPAL. *Semble*, that a judgment against the contractor for the erection of a building, establishing a mechanic's lien, is *prima facie*, but not conclusive, evidence of such lien as against a surety of such contractor.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

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Lubke & Muench, for the appellants.

Fisse & Tiffany, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action on a contract of guaranty indorsed on a building contract. The plaintiff sues as the assignee of Louis Joyeux. Joyeux, desiring to build a house upon ground owned by him, entered into a written contract with William Bormans, by which the latter agreed to do the work and furnish the materials for the sum of twenty-nine hundred dollars, payable in certain installments. Joyeux was a member in the plaintiff building association, and the association agreed to advance the money to him to enable him to make the payments provided for in the contract upon the security of the deed of trust upon the property, provided he would furnish satisfactory personal security for the performance of the contract on the part of the builder. Thereupon, he presented the contract to the managing officer of the building association, with a clause of guaranty indorsed upon it, signed by the defendant Alois Kleinhoffer. Kleinhoffer's responsibility was not known to the plaintiff's manager, and besides the plaintiff required two sureties and advised Joyeux of this fact. Thereupon, Joyeux procured the defendant Caspar Stolle to sign the clause of guaranty, as an additional surety, and brought the contract back to the plaintiff's officer with both names signed, and it was then accepted as satisfactory. Thereupon, the deed of trust was made, and the plaintiff advanced five separate installments of money, due under the contract by Joyeux, to Bormans, the builder. The evidence shows that four of these installments were in fact paid over to Bormans, and Bormans' receipts therefor were put in evidence. But, as to the first installment, the evidence, as we read it, goes no further than to

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show that the money was paid to Joyeux. We do not see distinct proof that it went into the hands of Borman's,—Bormans' receipt for it was not put in evidence.

Bormans absconded while the work was in progress, leaving it unfinished. Mechanics' liens were established against the house, and, under two of them, it was sold and bid in by the plaintiff. Joyeux assigned his cause of action for the breach of the contract of guaranty to the plaintiff, and the plaintiff has brought this action thereon as Joyeux's assignee. Joyeux died before the commencement of this action. At the trial the action was dismissed as to Bormans. The plaintiff had a verdict and judgment against Kleinhoffer and Stolle, the sureties or guarantors, in the sum of twenty-one hundred and ninety-four dollars and eighty-nine cents, and these defendants prosecute the present appeal. So much of the remaining facts, as are material to be stated, will be stated in connection with different assignments of error made by the appellants.

I. The contract of guaranty, upon which the action is brought, appears to be indorsed upon the builders' contract, below the signatures of the principal parties thereto, in the following words:

"I hereby bind myself for the execution of this contract in all its parts. St. Louis, January 3, 1884.

"Alois Kleinhoffer,
"Caspar Stolle."

The first point of the appellants is that the action is founded upon a written contract, whereby the appellants are alleged to have become answerable for the "debt, default or miscarriage of another person, *i. e.*, Bormans; that, under the *statute of frauds*, proof of such contract could consist only in a writing signed by Kleinhoffer and Stolle, or by some other person by them thereto lawfully authorized. R. S. 1879, sec. 2513. The argument is that the answer of defendants denied the contract as alleged; that the proof showed an

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instrument which is silent in its most essential requirements, in that it fails to show for whom the undertakers bound themselves,—whether as sureties for Bormans or Joyeux. The argument further is that, as the contract contains covenants to be performed by both Bormans and Joyeux, and as the memorandum signed by the sureties does not show for which they intended to bind themselves, it is void.

This assignment of error must be disposed of with the observation that the statute of frauds is not pleaded; that this question was not brought to the attention of the trial court in any way, so far as the record shows, either by objections to evidence, requests for instructions, or otherwise. It has been held in this state that in actions for breach of contract to purchase *land*, and for *specific performance*, the statute of frauds need not be pleaded, but the plaintiff must prove a contract valid within the statute. *Allen v. Richard*, 83 Mo. 55; *Springer v. Kleinsorge*, 83 Mo. 152. These decisions, which were rendered by the late supreme court commission, overturned in part what had previously been the settled rule in this state, and introduced confusion into our procedure on this question. This confusion is increased by the very recent decision of the Kansas City Court of Appeals, that, "The common-law rule, that one, who would avail himself of the statute of frauds, must especially insist upon it in pleading or be deemed to have waived the benefit of its provisions, is in force in this state." *Taylor v. Penquite*, 35 Mo. App. 399. In this confusion of the authorities we must adhere to our own recent decision, made after careful deliberation and adhered to after a motion for rehearing, in which we held that, for the statute of frauds to be available as a defense on appeal, it must appear from the record that it was brought to the attention of the trial court *in some way;* that it is *waived* unless distinctly asserted in the trial court;

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and that it cannot be set up for the first time in the appellate court; for parties must try their cases in the courts of *nisi prius*, and cannot make their defenses for the first time on appeal. *Scharff v. Klein*, 29 Mo. App. 549.

It is not necessary to say anything upon the argument that a portion of the answer may be construed as a special plea of the statute of frauds; there is nothing in the answer which can fairly be so construed. It is, therefore, immaterial, so far as any defense under the statute of frauds is concerned, that the clause of guaranty does not state for which party to the contract the signers became guarantors.

II. The next objection is a renewal of the same point, but without special reference to the statute of frauds. It is that the *ambiguity* in the written contract is a *patent one*, such as cannot be explained by parol testimony, and that therefore, regardless of the statute of frauds, the undertaking is so imperfect that it will not support a judgment against Kleinhoffer and Stolle. It is added in argument, that, whether parol evidence to explain the ambiguity was competent or not, no evidence was offered by the plaintiff to show for whom Kleinhoffer and Stolle became sureties.

Some observations may be made with reference to this assignment of error, which were made with reference to the preceding. We cannot discover in the record the trace of any suggestion made at the trial that the obligation was void in the sense that it did not state for which party the obligors entered into the undertaking. It is evident that, throughout the trial, both parties assumed this fact as not being a point of contention at all, and tried the case on the theory that the defendants became sureties for Bormans. This will appear from the following instruction, *requested by the defendants*, and given by the court: "The court instructs the jury that, by the contract in suit, the defendants,

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Kleinhoffer and Stolle, *bound themselves for the performance, on the part of Bormans*, of his contract to build a house according to the specifications in evidence, to the amount of twenty-nine hundred dollars, and if said Joyeux and Bormans afterwards substantially changed said contract between themselves, without the assent of said Kleinhoffer and Stolle, then the said Kleinhoffer and Stolle are thereby discharged from liability under the original agreement." This disposes of this assignment of error; for a party cannot try a cause on one theory in the trial court, and then change front and argue it on another theory in the appellate court,—unless we are to regard the writing as so ambiguous as to mean nothing without parol explanation, which explanation was not given. If this view is to be taken of it, then it afforded no evidence of a contract on the part of the defendants to guarantee the performance *by Bormans* of the contract on his part, and the objection was reached by demurrer to the evidence.

On this point it is to be observed that there is nothing impossible in the conclusion that it was intended as a guaranty of the faithful performance of the contract by *both parties*. It is not an unavoidable conclusion that it was intended as a guaranty of the performance by one party merely, and certainly the obligors, when they signed, must be taken to have meant *something*. In the absence of parol explanation it was for the court to say what they did mean. There is a well-known practice of executing such guaranties *by builders*, because they are frequently not pecuniarily responsible, and such guaranties are necessary to indemnify the owners in the case of the liens of subcontractors and materialmen being charged on the property. But I suppose that no lawyer or judge in St. Louis ever saw a building contract, where such a guaranty was furnished *by the owner;* and this for the obvious reason that not only the building itself, but

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also the lot of ground on which it stands, is an adequate security under the statute relating to mechanics' liens, for the performance of the contract on the part of the builder. This was evidently the assumption of both parties at the trial, else the paper would have been objected to on some general ground; but it was only objected to, when offered in evidence, on the ground that the assignment of Joyeux to the plaintiff should have been first offered in evidence. The argument, which is now directed against it, is the suggestion of ingenious counsel who have been called into the case since the trial. To give countenance to such an objection would be not only to allow the case to be disposed of on appeal on a different question from that on which it was tried, but it would also be to disregard the principle that an instrument is to be construed in view of its entire purport and meaning, and to hold that it has no meaning, when all men having any experience in the matters to which it relates would agree that it means one thing, and one only.

But there is another view. Where the meaning of an instrument is doubtful, resort may had to the circumstances under which it was given. Here the plaintiff's manager proposed to advance the money, not to Joyeux, but direct to Bormans, the builder, and did so advance it. The plaintiff, therefore, wanted security that Bormans would perform the building contract and save the property on which the plaintiff advanced the money free from mechanic's liens. He thereupon demanded that Joyeux procure such security. Joyeux thereupon brought him the name Kleinhoffer indorsed to this guaranty; this he rejected as insufficient. Joyeux thereupon brought him the additional name of Stolle indorsed to it. This was circumstantial evidence upon which the jury would act, and upon which all men would act,—that the signers of this guaranty intended to guaranty the performance of this contract by Bormans and not by Joyeux.

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III. The real defense upon which the case was contested was set up in the answer of Kleinhoffer and Stolle in the following language: "That their names on the back of the exhibit were placed there by them without *consideration*, and at a time when there was nothing written over the said signatures, and after the work contemplated by said contract, Exhibit A., had been commenced and partly done." It is to be observed that the contract itself shows that it was signed by the principal undertakers on the *fifteenth of February*, and the clause of guaranty, which is the foundation of the action, is dated on the *third of January*. As to so much of this clause of the answer as states that, when the contract was signed, there was nothing written over the signatures, we may observe that there was no evidence in support of it.

As to the final allegation, that the work contemplated by said contract, Exhibit A., had been commenced and partly done, when it was signed, it is assigned for error that two witnesses, Hardwig and Miller, were offered by the defendants to support this allegation, and that the court excluded their evidence on the objection of the plaintiff. This assignment, in point of fact, is borne out by the record as to the witness Miller only, as the testimony of Hardwig on that subject was admitted. This court reluctantly decided that an action cannot be maintained against a surety in a bond given by a builder to indemnify the owner against mechanics' liens, where the bond is executed *after the building contract*, and without any new consideration. *Ring v. Kelly*, 10 Mo. App. 411. The rule of the common law, which allows a party to impeach his solemn written promise upon the ground of a want of consideration, has been often criticised as a rule which proceeds on a lower plane of honesty than the analogous rule of the civil law, and which in many cases sanctions deliberate breaches of faith and leads to

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business immorality. The courts are nevertheless bound to administer it, because it is a settled principle of law which they have not the authority to set aside. Such a principle, however, ought not to be applied except upon evidence which is reasonably strict and certain. One who has deliberately made a promise in writing ought not to be allowed to escape it on loose and vague evidence, especially where a third party has advanced money on the faith of that promise; but the trial courts must be trusted to see to this in the exercise of the limited discretionary power, which the law allows them in setting aside verdicts as against the weight of the evidence, which power the appellate courts do not possess. If the evidence *had a tendency* to show that work under the contract had been commenced before the writing of guaranty was signed, we must hold that the trial court was bound to admit it in the first instance, and allow its weight to be determined by the jury. This court is of opinion that the evidence had such a tendency, and that the trial court erred in excluding it.

IV. The defendant requested, and the court refused, the following instruction: "The court instructs the jury that, if they believe, from the evidence, that Kleinhoffer and Stolle put their names on the back of the paper introduced in evidence, after Joyeux and Bormans had made their contract, and after Bormans had entered upon the performance of said contract, then there is no consideration for their undertaking, and said Kleinhoffer and Stolle are not liable in this action."

There was no substantial evidence in support of this hypothesis of this instruction. The witness Hardwig, who did the stonecutting for the house under a contract with Bormans, testifies that he *got the contract* from Bormans "in the latter part of November or the latter part of December, 1883—in the fall of 1883." He also testified: "I done all the cut stone work; I done work right along from the time I got it. The moment

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I got the work I started on it." This evidence does not at all tend to show that at the time, when Bormans let the work to the witness and when he went to work at the job, Bormans had commenced work *under the contract* in evidence. This might have been otherwise, if Bormans' deposition had been admitted.

V. We shall next dispose of the assignment of error that the trial court erred in excluding, without qualification, the testimony of the defendants, Kleinhoffer and Stolle. The theory of this exclusion was that Joyeux, the other party to the contract, being dead, these witnesses were incompetent under the provision of section 4010 of the Revised Statutes of 1879. This question need not be argued. It is settled by the decision of the supreme court against the appellants in *Meier v. Thieman*, 90 Mo. 434, and other cases which have followed that decision.

But it is argued that these witnesses were competent so far as the petition alleges a cause of action in favor of the plaintiff, otherwise than as assignee of Joyeux, to rebut the testimony of Mr. Rowse, the plaintiff's managing officer. The answer to this assignment of error is that it does not appear from the record that the petition does state another cause of action. All the questions which were put to them, and which the court excluded, related to the circumstances under which they signed the contract of guaranty, and no question was put to them and excluded, tending to elicit an answer which would reach any matter outside of this.

VI. The deposition of Bormans, taken in a prior action depending, in which Joyeux, the plaintiff's assignor, was plaintiff, and the present defendants were defendants, was offered in evidence and excluded by the court, apparently on the same ground. This ruling is assigned for error, and the same reasons are renewed in support of the assignment. This deposition was taken on behalf of Joyeux. The record recites that

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this deposition was "taken in the same suit under a different style—in the suit of Joyeux *v.* Stolle *et al.*, by the plaintiff, and during the time when Joyeux was alive." The court erred in this ruling. The deposition was competent, because taken when Joyeux was living. *Coughlin v. Haeussler*, 50 Mo. 128; *Breeden's Adm'r v. Feurt*, 70 Mo. 624. It was material to the issues in the present action, and should have been admitted. The fact, that this plaintiff was not a party to the record in that action, does not exclude the deposition, since the plaintiff claims through the party who took the deposition, and the essential issues in the two actions are assumed to be the same. *Parsons v. Parsons*, 45 Mo. 265; *Adams v. Raigner*, 69 Mo. 363.

VII. The following instruction on the measure of damages was given at the request of the plaintiff:

"1. The jury are instructed that, if under the other instructions in this case they find in favor of the plaintiff, they will assess the damages which the plaintiff is entitled to recover at such sum as they may believe from the evidence to be the amount paid by said Joyeux, or by the plaintiff for him, upon the contract price of said house and the amount of the judgments and costs, which they may believe from the evidence was paid in satisfaction of any claims of mechanics or materialmen for labor and material, done and furnished on said house, and from the aggregate amount of these sums the jury will deduct the contract price of the said house, and the price of any work done and not included in the contract price, and add interest at the rate of six per cent. per annum from the time this suit was filed to the amount of such difference."

This instruction is criticised on the ground that it did not submit to the jury the question, whether the costs which had been incurred in the mechanics' lien suits had been *reasonably incurred.* It is to be observed that all these costs were what are termed

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court costs, and none of them were attorneys' fees. They were costs which had been taxed in the various mechanics' lien suits by the proper taxing officers. The presumption of right acting, which attends ordinary official conduct, is sufficient to raise the inference, *prima facie*, that they were correctly taxed. If they were incorrectly taxed, it was for the defendant to rebut this inference. No evidence was offered for that purpose in the trial court; and this objection, like most of the others, is an attempt to inject into the case on appeal a question which was not raised in any way at the trial.

VIII. It is also objected to this instruction that it does not except those costs which were incurred after the levy of the execution upon Joyeux's property, nor the costs of selling that property and making the sheriff's deed to the plaintiff corporation, which was the purchaser at the sheriff's sale. All these costs, it is argued, were taken out of the proceeds of the sale. The theory of the defendants on this point is that, after the liens were established by judgment, and Joyeux' property was about to be taken on the executions, it became his duty to pay off the lien judgments; that he had no right to increase the charge on the sureties of Bormans by suffering a sale of his property at their expense; that this non-action on his part was unreasonable, or a misfortune which the law will not permit him to shift upon the appellants; and, finally, it is argued that the law imposes on Joyeux the active duty of making reasonable exertions to render the injury as light as possible.

My associates are of opinion that this point is well taken. They take the view that, the rights of the plaintiff being derivative from Joyeux, the plaintiff can recover only such damages as Joyeux could have recovered,—in which view I concur. They also take the view that Joyeux could not have recovered the costs of advertising his own property for sale,—that such costs

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cannot be regarded as general damages such as naturally flow from a breach of their contract on the part of the defendants. In this view I do not concur. My view is that these costs of sale were as much a part of the cost to which the lien claimants were put in realizing their debts as the court costs proper; that they were equally paid out of the estate of Joyeux, and form equally a part of the loss suffered by him. The argument founded on the doctrine of such cases as *Douglas v. Stephens*, 18 Mo. 362, that he ought not to recover such costs, because he could have averted them at a *trifling expense*, to-wit, by paying off the liens, I do not regard as properly applied to such a case. If he had been a man of means and had had the money with which to pay off the liens, he could thus have averted these damages; if he was a poor man without such means, he could not have done so. Besides this argument would show that he would not have been entitled to recover of these guarantors any costs incurred in the mechanics' lien suits, since he could have averted such suits by paying off the liens before suit brought. I also think it a fair argument to say that Joyeux did not become surety for Bormans, but that Kleinhoffer and Stolle did, and that the sureties themselves might have protected themselves from the costs by coming forward and paying off the liens before the property went to sale under the lien judgments; and as they were sureties for Bormans, and as Joyeux was not, it was principally their duty to do it, and not his.

IX. In the following general instruction the court submitted to the jury the grounds on which the plaintiff was entitled, if at all, to recover.

"2. If the jury believe from the evidence that in or about the month of February, 1884, Louis Joyeux, now deceased, and the defendant, W. A. Bormans, executed the contract read in evidence, dated February 15, 1884, for the building of the house therein described,

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and that, before the execution and delivery thereof, the defendants, Alois Kleinhoffer and Caspar Stolle, signed the writing on the back of said contract, viz.: 'I hereby bind myself for the execution of this contract in all its parts. St. Louis, January 3, 1884.' And if the jury further believe from the evidence that the said defendant Bormans entered upon the performance of the work mentioned in said contract, and that he received from the said Joyeux, or from the plaintiff on account of said Joyeux, various sums of money as the work progressed in payment for the same, but that said Bormans never completed the erection of said house; and that he failed to furnish at his own cost or to pay for all the work, labor and materials necessary for the completion of said house, and the improvements mentioned in said contract, and that, by reason of such failure on the part of said Bormans, various persons, who had furnished material or done work upon the said building as sub-contractors under the said Bormans, filed mechanics' liens against the said house and the lot of ground on which the same was erected, and that such persons, or some of them, thereafter instituted suits for the purpose of enforcing such mechanics' liens, and in such suits obtained judgment for the amount of their several claims against the said defendant Bormans, and that the said judgments were declared a lien against the house of said Joyeux, and the lot of ground on which the same was erected, and that thereafter the said house and lot was sold by the sheriff of the city of St. Louis under execution issued upon the said judgments for the said mechanics' liens, and that the said mechanics' liens were paid out of the proceeds of said sale of said house and lot; and if the jury further believe from the evidence that the said Joyeux has transferred and assigned to the plaintiff all his right of action against the defendants herein arising out of the said contract, and the said writing on the back thereof signed by the said defendants, Kleinhoffer and Stolle, to the plaintiff, the

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LaFayette Mutual Building Association; then the jury will find in favor of the plaintiff, and will assess the damages herein according to the directions in another instruction given you, unless the jury find from the evidence that a material change was made in the contract between Joyeux and Bormans as defined in other instructions."

The first objection to this instruction is, that it assumes that the appellants necessarily signed as sureties for Bormans. We have pointed out that this was the theory of both parties at the trial, and we have above quoted an instruction, given at the request of the defendants, which contained this hypothesis.

The next objection taken to it is, that it makes Kleinhoffer and Stolle liable for all the lien judgments rendered against Bormans, notwithstanding the proof that some of these embraced work and material not ordered by Bormans at all. We take it that the judgments were at least *prima facie* evidence against the sureties upon this question, as Bormans was a party defendant in all of the actions in which they were rendered. The observations made in argument in support of this point, that this instruction is evidently drafted upon the idea that the sureties were conclusively bound by the judgments against Bormans, seems to us well taken. It has been held in this state that the sureties of an administrator are *conclusively* bound, in the absence of fraud or collusion, by judgments against their principal. *State to use v. Holt*, 27 Mo. 340; *Dix v. Morris*, 66 Mo. 514; *State ex rel. v. Rucker*, 59 Mo. 25; *State ex rel. v. James*, 82 Mo. 516; *Taylor v. Hunt*, 34 Mo. 205; *State ex rel. v. Creusbauer*, 68 Mo. 254. But, as pointed out in *State to use v. Martin*, 18 Mo. App. 468, 474, this line of holdings seems to rest on the peculiar language of an administrator's bond, by which the surety agrees to perform all things required by law, "or the order or decree of any court having jurisdiction," and it was held that, there being no such provision

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in a guardian's bond, the sureties of a guardian might show anything contrary to the settlement, if they could. Whether the principle applies to sureties upon undertakings not given in judicial proceedings, such as guarantors, is more doubtful. See the note of Mr. Freeman, 83 Am. Dec. 380, *et seq.* It has been held by the supreme court of the United States that a judgment confessed by a principal is admissible in evidence to charge his guarantor, though it is not conclusive. *Drummond v. Prestman*, 12 Wheat. (25 U. S.) 515. We apprehend that this expresses the correct principle; at least, in the absence of direct authority, it is as far as we feel willing to go.

There was evidence tending to show that so-called extra work and materials, of the aggregate value of fifty-two dollars and eight cents, were performed and furnished by Hammer & Weber on a separate order made directly by Joyeux; that these materials were included in their bill against Bormans, and were a part of the account for which they established a lien against the property. This evidence was not contradicted, and, while we do not precisely see on what calculation the jury arrived at their verdict, we apprehend that this item should have been excluded from their consideration.

X. The verdict of the jury, which was for the sum of twenty-one hundred and ninety-four dollars and eighty-nine cents, evidently included the four hundred dollars, of which the first installment due under the building contract consisted. As intimated in the early portion of this opinion, the evidence did not fairly tend to show that this payment had ever been made *to Bormans*. The only testimony on the question was delivered by the managing officer of the plaintiff corporation, and so much of it as relates directly to this point was as follows:

"*Q.* How much was altogether paid to Mr. Bormans, and charged in this way to Joyeux? *A.* Two thousand dollars. I cannot recollect now exactly, excepting by

my books; but there are two thousand dollars there, sixteen hundred dollars, rather."

The witness here evidently alluded to the four vouchers evidencing the payment of the second, third, fourth and fifth installments, and showing that the money had been received by Bormans, each installment being four hundred dollars, and the aggregate being sixteen hundred dollars. The testimony of the same witness continued thus:

By the court: "*Q.* The receipt for the first installment is not there? *A.* No, sir; only two, three, four and five."

By Mr. Fisse (counsel for the plaintiff): "*Q.* You have that at your office, I suppose? *A.* I suppose so, yes. The first payment, if I recollect right, was something more than that. There was, if I recollect right, a little lien or loan; Joyeux put some money in my hands, and I paid the lien or loan.

"*Q.* Do you recollect the amount of the first payment? *A.* If I recollect it—I suppose enough over four hundred dollars to pay off the lien; my ledger would tell, but I don't remember.

"*Q.* (Handing book to witness.) What is this book? Is this the ledger you refer to? *A.* Yes, that is the ledger of the building association (meaning the plaintiff).

"*Q.* By whom is that book kept? *A.* By myself.

"*Q.* Do you know that the entries in that book are correct? *A.* Yes.

"*Q.* And that they were made at the time of the transaction? *A.* Yes.

"*Q.* Will that book assist you, refresh your recollection with respect to the first payment? *A.* Yes, sir.

"*Q.* Please refer to it and tell us what it was? *A.* The account of Louis Joyeux is here on page 362; he is charged on the tenth of March"—(interrupted). Counsel for defendant object to the entry as incompetent; which objection is *sustained* by the court.

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"*Q*. Do you recollect what money was paid to Bormans? *A*. I cannot remember; if the voucher is not in your hands it is probably at my office, which would show the fact."

At the close of the examination of the witness the court addressed the plaintiff's counsel thus: "You have put in no testimony about that first payment; I do not know whether you overlooked it." No reply was made to this suggestion, nor was the voucher concerning the first payment produced or offered in evidence; nor was there any evidence of the payment other than that above recited. As the witness could not recollect the fact of the payment, so as to state it from his own recollection, even after consulting his ledger, which had been kept by himself, we must conclude that there was no substantial evidence afforded by his statements of the payment having been made.

It is plain, from the amount which the jury have returned as their verdict, that they included this first installment of four hundred dollars in the computation. In so far as they did this, their verdict is without support in the evidence, and, if the state of the evidence as to this item should be the same, this error should be avoided on another trial.

The judgment will be reversed, and the cause remanded. All the judges concur.

THE STATE OF MISSOURI at the Relation of ROBERT F. SANDERS, Relator, v. JAMES B. BLAKEMORE, Respondent.

St. Louis Court of Appeals, April 1 and April 8, 1890.

1. **Circuit Clerks: RIGHT TO RESIGN WHILE SUSPENDED FROM OFFICE. The suspension of a clerk of the circuit court from office, pursuant to an order of the circuit judge, does not disable such clerk from resigning his office or abate his right to resign.**

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2. ——— : AUTHORITY OF GOVERNOR TO FILL VACANCY. Such resignation causes a vacancy in the clerkship which the governor has the right to fill by appointment, notwithstanding that the circuit court has previously appointed a temporary clerk, who holds the office at the time of the appointment by the governor.

3. Appeal: FROM THIS COURT TO SUPREME COURT. *Held* (THOMPSON, J., *dissenting*) that an appeal does not lie from this court to the supreme court in an action wherein this court exercises original jurisdiction, notwithstanding that the determination of the cause involves a constitutional question.

Original Proceeding by Writ of Quo Warranto.

JUDGMENT OF OUSTER.

Hough & Hough, for the relator.

It is said that Bragg had nothing to resign, because a temporary clerk had been appointed, who was in possession of the office. Bragg's death, after his suspension, would undoubtedly have created a vacancy in the office. How could his death create a vacancy unless in the eye of the law he was the incumbent of the office, notwithstanding his suspension? Bragg's removal, if he had been tried and convicted, would have created a vacancy, for the statute so declares. R. S. 1879, secs. 3337, 615. If his legal occupancy of the office was such that his death or removal from it would create a vacancy in it, why was not his legal occupancy of it such that he could create a vacancy by surrendering this legal occupancy? There is no merit in the claim that the respondent has a right to hold the office as temporary clerk until the successor to the regular clerk, Mr. Bragg, is elected. The act of April 28, 1877 (Acts of 1877, p. 192), and of April 23, 1877 (Acts of 1877, p. 346), the pertinent provisions of which are to be found in sections 615 and 3337 of the Revised Statutes, 1879, qualify the provisions of section 630, Revised Statutes, under which the respondent was appointed. In view of

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these statutes, the word elected in section 630, if it should be given any force and effect whatever, must be construed to mean chosen according to law, or appointed according to law. Under the sections referred to, the governor had an undoubted right, in the event of the death of Bragg, or the resignation of Bragg, or the removal of Bragg, to appoint his successor.

James Carr and *Lee & Ellis*, for the respondent.

The office of clerk of a circuit court is a statutory office, and its tenure is regulated entirely by statute. R. S. 1879, sec. 614. The incumbent may be removed or suspended by the circuit court or judge, and such court or judge may then appoint a temporary clerk in his place. R. S. 1879, sec. 630. The tenure of office of the temporary clerk is "until the regular clerk shall resume his office, or a successor shall be elected." The appointment vests a perfect right in the temporary clerk to the office until one or the other of those events shall happen. The regular clerk, pending his suspension, cannot resign and thereby escape the penalty to which he is liable, and, at the same time, create "a vacancy" in the office, and thereby divest the temporary clerk of his perfect vested right to the office. *Hunter v. Chandler*, 45 Mo. 152; *People v. Hartwell*, 12 Mich. 508; *State v. Pierce*, 35 Wis. 93; *Edwards v. United States*, 103 U. S. 471; *Thompson v. United States*, 103 U. S. 480; *People v. Collins*, 19 Wend. 56; *Commonwealth v. Smith*, 45 Pa. St. 59, The respondent as temporary clerk has a perfect right to fill the office in question until the regular clerk shall resume his office, or a successor shall be elected, neither of which has happened. He took possession legally, and he still holds it legally, and, so long as he holds the office and performs the duties thereof according to law, there is, and there can be no "vacancy" in the office. The condition did not, and does not, exist, upon which the

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governor is by the constitution authorized to appoint. Consequently, the appointment of the relator is null and void. Constitution, sec. 2, art. 5; *State ex rel. v. Lusk*, 18 Mo. 33; *Commonwealth v. Hanley*, 9 Barr. 513.

THOMPSON, J., delivered the opinion of the court.

This is a proceeding by information in the nature of a *quo warranto* at the relation of a private party, claiming title to the office of clerk of the circuit court of Dunklin county, against the respondent who is in possession of that office. The relator demurs to the return. The court has heard oral argument on the demurrer, and the case is now submitted on written arguments, and with the understanding that the decision of the court is to be a final disposition of the controversy. The facts, as stated in the return demurred to, are that on the sixth day of December, 1888, the regular clerk, William G. Bragg, Jr., was suspended from office by the judge of that court, under section 630 of the Revised Statutes of 1879, for certain alleged misdemeanors in office, and the respondent was thereupon appointed "a temporary clerk" in his place, under the same statute. On the seventh of January, 1889, three separate informations were filed by the prosecuting attorney of Dunklin county, in the circuit court of that county, against Bragg, for these alleged misdemeanors, which informations are still pending.

On the twenty-second day of January, 1889, while so suspended from office and prosecuted criminally for alleged misdemeanors in office, Bragg tendered his resignation of the office to the governor of the state. The governor accepted the same, and, acting under the provisions of section 11 of article 5 of the constitution of the state, and section 615 of the Revised Statutes of 1879, appointed the relator clerk of the circuit court of Dunklin county, to hold the office until the next general

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election. The relator thereupon took the oath of office, and presented to the judge a sufficient bond with sufficient securities, which the judge refused to approve, not on the ground of its insufficiency, but on the ground that the relator was not entitled to the office. Thereupon the relator applied to this court for a *mandamus* to compel the judge to examine his sureties, and approve his bond, if found sufficient. We held that the judge had no power in this way to determine the title of the relator to the office; that the commission issued to him by the governor showed a *prima facie* title to it, and that he had a right to have his bond approved, if sufficient, in order that he might show himself to be qualified for office and ready to enter upon the performance of his duties, and thus be in a position, standing at the threshold of the office, so to speak, to institute the proper proceeding for its possession, if entitled to it. We accordingly awarded a *mandamus* against the judge, in accordance with the prayer of the petition, at the same time expressly refraining from deciding that he was entitled to the office, or intimating an opinion on the subject. *State ex rel. Sanders v. Wear*, 37 Mo. App. 325.

The relator, having thus secured the approval of his bond, now brings this proceeding against the temporary clerk, appointed by the judge, to recover possession of the office. The only ground, on which his right to the office is resisted, is that the regular clerk had no power to resign the office, while under suspension and proceeded against criminally for alleged misdemeanors in office; that his resignation was consequently void; that there was hence no vacancy, and accordingly that the appointment of the relator was void.

No decision has been cited to us, which holds that a public officer is disabled from resigning his office with the concurrence of the official empowered to appoint his successor, by reason of the fact that he is suspended

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from a performance of its duties, or that a criminal prosecution was pending against him for alleged misdemeanors in office. The weight of judicial authority is to the effect that a public officer cannot resign his office and cast off its duties at his mere pleasure, without the concurrence of the appointing power, since, if the rule were otherwise, society might be disorganized by reason of the refusal of public officers to perform the duties of their office (*Edwards v. United States*, 103 U. S. 471, and cases cited; Meacham's Public Offices, sec. 409); though considerable respectable authority supports an unqualified right of resignation. Meacham's Public Officers, sec. 409, and citations. But we apprehend that it is not the law that, while a public officer may resign his office under ordinary circumstances with the concurrence of the appointing power, yet he cannot resign it under circumstances where his resignation is itself a confession of his unfitness longer to hold it. In the impeachment trial of Belknap, Senators Frelinghuysen and Edmunds, both eminent lawyers, were distinctly of this opinion, and so was Senator Ingalls, though the question did not strictly arise, since Belknap resigned his office, and his resignation was accepted by the president, *before* the articles of impeachment were exhibited against him, though on the same day.

We have been cited by counsel for the respondent to a class of cases, which are to the effect that where proceedings have been commenced against an officer to test his title to his office, his resignation of the office or the expiration of his official term, while the proceedings are pending, will not prevent them from being prosecuted to a final determination. *Hunter v. Chandler*, 45 Mo. 452; *People v. Hartwell*, 12 Mich. 508; *State v. Pierce*, 35 Wis. 94. And so as to a corporate officer. *Commonwealth v. Smith*, 45 Pa. St. 59. The reason, which these authorities give for so holding, is that the proceeding is not instituted for the *sole* purpose of

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removing the respondent; a fine may also be imposed; he may be adjudged to pay the costs; and the successful prosecution of the action by the relator may be, and generally is, necessary to enable him to maintain a subsequent action for the emoluments of the office. These authorities go no further than to show by analogy that the resignation of Bragg may not have had the effect, that he probably intended by it, to abate the criminal prosecution against him. Whether it did or not is a question not now before us for decision, and we do not intend to express any opinion upon it. We hold, however, that there is no rule of law or of public policy, that requires a man to remain in a public office in order to be punished by being removed from it.

This brings us to the question of the tenure of office which the temporary appointment of the judge vested in the respondent, for though Bragg, while under suspension, had the undoubted right to resign with the concurrence of the governor what further right or duty he had in respect of the office, it would not necessarily follow that the governor would have the power to appoint his successor; if, as counsel for the respondent argue, the tenure of the respondent's office is fixed by the statute until the next election, in any event except that of the restoration of the regular clerk, the governor would have no such power. This question must be decided by a comparison of the constitutional and statutory provisions bearing upon it.

Section 11 of article 5 of the constitution of the state is as follows:

"When any office shall become vacant, the governor, *unless otherwise provided by law*, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

Section 614 of the Revised Statutes of 1879 is as follows: "At the general election in the year eighteen

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hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis Court of Appeals, *and except as otherwise provided by law*, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years and until their successors shall be duly elected and qualified, unless sooner removed from office."

Section 615 of the same statutes provides as follows: "When any vacancy shall occur in the office of any clerk of a court of record by *death*, *resignation*, *removal*, *refusal to act or otherwise*, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Section 630 of the same statutes contains the following provision: "When any court, or the judge or judges, or a majority of them in vacation, shall believe, from their own knowledge or from the information of others, on oath or affirmation, that the clerk of the court in which they preside has been guilty of a misdemeanor in office, they shall give notice thereof to the attorney general or prosecuting attorney, stating the charges against such clerk, and requiring him to prosecute the same; and they may suspend such clerk from office until a trial can be had, and appoint a temporary clerk, who shall possess the same qualifications, take the same oath, and give like bond as other clerks, and who shall possess the same power, perform the same duties and receive the like fees as other clerks, and shall

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continue in office until the regular clerk resumes his office or a successor shall be elected."

From the constitutional and statutory provision above quoted it is evident that the governor had the power to appoint the relator to the office upon the resignation of the regular clerk, unless it was "otherwise provided by law." Section 614 of the Revised Statutes of 1879, above quoted, shows that it is the general policy of the state that all clerks of courts, other than clerks of the supreme court and those of the appellate courts, shall be elected by the people, and not appointed by the judges. Section 615 contains a special provision intended to meet the exceptional case of the death, resignation, removal or refusal to act of any clerk of a court of record, and it confers on the governor the power to appoint an eligible person to fill the vacancy until the next general election. If a "vacancy" was created in the office, in the case before us, by the resignation of Bragg, this section answers all the arguments which have been made against the relator's title to the office; and such a vacancy was created, unless there was no "vacancy" by reason of the fact that section 630, above quoted, used the word "elected" instead of the words "elected or appointed." If we restrain this word "elected" to its literal sense, the conclusion of counsel for the respondent is a sound one. This is the only point in the whole argument which admits of any doubt. But we think that the word "elected," as thus used, includes "appointed" where the circumstances are such that it is appropriate to annex that meaning to it. The word, in a general sense, means "chosen" (Anderson's Dict. of Law, verb, "elect"), and is capable of being so read as to mean a choice by a vote of the people at an election or by the governor under his power of appointment.

That it is so used in a succeeding section of the same chapter is clear of all doubt. Section 639 provides: "All clerks of courts of record herein provided for, and

all *ex officio* clerks of courts of record now in office, shall continue in office and discharge all the duties of their respective offices until the expiration of the terms for which they were respectively *elected.*" It is quite obvious that a clerk holding by *appointment* would, under this section, hold his office for the term to which he was appointed. It is true that, by the Revised Statutes, 1879, section 3126, words and phrases, other than technical ones, "shall be taken in their plain or ordinary and usual sense," "unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute." Here we think it plainly repugnant to the intent of the legislature to construe the word elected as ousting the governor of his power of appointment conferred upon him by the constitution and by a provision of section 615 of the same statute.

It is obvious that there cannot be two clerks holding the same office. The regular clerk, by his suspension, either ceased to hold the *office*, or he did not. If he ceased to hold it, then no effect can be given to that part of the general statute relating to officers, which provides that an officer prosecuted for a misdemeanor in office may be *removed* from office. R. S. 1879, sec. 3337. It is clear then, that, notwithstanding his suspension, he was still the clerk, and that the respondent was what section 630 of the Revised Statutes of 1879 intends,—a mere "*temporary clerk*," a *locum tenens*, so to speak, holding the place only during the suspension of the regular clerk. But, if the respondent's position is correct, he holds the office until the next general election in every event except that of the restoration of the regular clerk. If the regular clerk should *die* during suspension, or if he should be *removed* by a judgment in the criminal proceedings, the governor could not appoint his successor to hold until the next general election, because the statute provides that the temporary appointee shall hold until his successor is "elected."

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This would seem to be not only opposed to the obvious policy of the legislature of the state, but it would make section 630 quite out of harmony with section 615.

The judgment of the court will be that the demurrer to the return be sustained. And the court proceeding to enter judgment on said demurrer finds that the respondent is guilty of unlawfully holding and executing the office of clerk of the circuit court of Dunklin county. And it is considered by the court that he be ousted from the said office; that he pay to the state of Missouri the fine of one dollar, and that the relator recover the costs of this proceeding. It is so ordered. All the judges concur.

ROMBAUER, P. J., delivered the opinion of the court on an application of the respondent for an order allowing an appeal.

The respondent, having filed his bill of exceptions, now prays for an allowance of an appeal to the supreme court, and tenders his bond in the sum of three thousand dollars with two responsible sureties, and asks that the same be approved by the court and filed in this cause, to operate as a *supersedeas* of the judgment of ouster herein rendered. The relator resists the application on the ground that the laws of this state do not provide for an appeal from this court to the supreme court in any cause, and make no provision for a *supersedeas* bond.

The right of appeal is claimed by the respondent on the ground that the cause involves the construction of the constitution of this state and the title to an office under this state, and is, therefore, within the provisions of section 12 of article 6 of the constitution which provides: "Appeals shall lie from the decisions of the St. Louis Court of Appeals to the supreme court, and writs of error may issue from the supreme court to said court in the following cases only: In all cases where

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the amount in dispute, exclusive of costs, exceeds the sum of twenty-five hundred dollars; in cases involving the construction of the constitution of the United States or of this state; in cases where the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question; in cases involving the construction of the revenue laws of this state, or the title to any office under this state; in cases involving title to real estate; in cases where a county or other political subdivision of the state or any state officer is a party, and in all cases of felony."

The relator does not deny the superintending power and control of the supreme court over this court, but he contends that the adoption of the constitutional amendment, concerning the judicial department (Laws, 1883, page 215), necessarily repealed that part of the section 12 of article 6 of the constitution, hereinabove quoted, and that the only methods provided by the constitution for the exercise of such superintending control are contained in section 8 of that amendment which provides: "The supreme court shall have superintending control over the courts of appeals, by *mandamus*, prohibition and *certiorari*." While the subject is not free from doubt, we are inclined to hold that this view is the correct one.

It will be found on examination that the constitution before this amendment did in no way restrict the superintending control of the supreme court over this court. It provided in section 3, article 6: "The supreme court shall have a general superintending control over all inferior courts," and provided in section 12, above quoted, that such control may be exercised by appeal and writ of error in certain cases therein mentioned. Section 8 of the amendment, therefore, which prescribes the mode and manner in which the supreme court shall thereafter exercise such superintending control, is either exclusive of all other methods

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or else we are bound to reject the entire section as surplusage and meaningless. Yet, under well-recognized canons of construction, we are bound to give full effect to it if we can.

The eleventh section of the amendment provides: "All provisions of the constitution of this state, and all laws of this state which are inconsistent with this amendment, shall, so far as inconsistent, upon its adoption, be forever rescinded and of no effect," and we must conclude that a provision, giving a certain superintending control in a *specific manner*, is necessarily inconsistent with a control in any other manner, and hence abrogates it.

It may be claimed that appellate jurisdiction and superintending control are different things, and hence a superintending control, though its manner is specifically prescribed, does not abrogate the right of appeal. The answer to this seems to be that the object of the entire amendment of 1883, was to do away entirely with the intermediate courts of appeal. Were it otherwise, no valid reason would exist why an appeal improvidently granted to this court, either because it involved an amount or question of law beyond the appellate jurisdiction of this court, might not be determined here in the first instance, and the party aggrieved still have the right to appeal from such determination to the supreme court under the provisions of section 12 of articles 6 of the constitution. The same reasoning, which gives him the right of appeal in cases originating in this court, would give him the right of appeal in cases improvidently appealed thereto. Yet it has never been held that an appeal lies in the latter class of cases, but the supreme court has uniformly exercised its superintending coutrol by one of the remedial writs specially mentioned in the eighth section of the amendment.

The argument advanced by the respondent that the constitution contemplates that the supreme court alone

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shall have final jurisdiction of certain questions is unquestionably correct, and we have never disputed it, but the question for decision before us is not whether the supreme court has final jurisdiction, which is conceded on all hands, but how that jurisdiction shall be exercised. Cases involving questions mentioned in section 12, coming to this court by appeal, are at once transferred to the supreme court under the provisions of section 3 of the amendment, and laws enacted in pursuance thereof, and the legislature might, if it saw fit to do so, provide by law for the transfer of causes, involving the same subjects and originating in this court, for final determination.

Nor is there any reason apparent why the right of appeal is essential to work out the aims of the constitution. The law makes no provision for a *supersedeas*. There is no provision for a trial of the cause *de novo* in the supreme court, and a *certiorari* is as effectual to remove the record from this court to the supreme court, as an appeal or writ of error can be; in fact, as decided in *Chicago, Rock Island and Pacific Railway Co. v. Young*, 96 Mo. 39, the writ of *certiorari* in this state is in the nature of a writ of error at common law, and operates in the same way.

We may add that the views above expressed seem to us not only more in harmony with the principles underlying our present judicial system, but best designed to promote a speedy and safe determination of questions arising upon remedial writs. The power to hear and determine such cases is expressly given to the court of appeals. The danger of the abuse of the power on their part is carefully guarded by the superintending control of the supreme court by prohibition and *certiorari*. *Certiorari* is a writ of discretion, and the supreme court may in any case determine upon inspection of the record whether it presents a proper case for its issuance; but the right of appeal, if it exists at all, is a right not controlled by the discretion of any court,

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and places it within the control of either party to protract indefinitely a litigation, in the speedy settlement of which, from its very nature, not only the litigants themselves, but also the public, may be, and often are, greatly interested.

As above said we do not deem the question free from doubt, and are desirous of having it tested and set at rest. If this court is a mere trial court, in the full sense of the term, of causes brought here by original remedial writs, then there is no reason why it should entertain them at all. Where the rights of the parties depend on contested facts, the circuit courts furnish a much more convenient forum for settling the controversy, and where they depend purely on contested propositions of law, the parties had better apply directly to the supreme court where they can obtain a final hearing at once.

We will deny the appeal, so that the respondent may have the question tested at once, by applying for a writ of error or *mandamus* in the supreme court, or at his election for a writ of *certiorari*. Appeal denied.

In the views herein expressed Judge BIGGS concurs. Judge THOMPSON dissents.

THOMPSON, J. (*dissenting*).—My view briefly is that the original grant of jurisdiction to this court, in the constitution of 1875, in proceedings by *quo warranto*, is coupled with a provision giving the right of appeal to the supreme court in cases like the one before us; that this right of appeal has not been taken away, either in express terms or by necessary implication, by the constitutional amendment; and that such an implication is precluded by the rule that repeals by implication are not favored, especially where they work a deprivation of previously existing rights. But I concur with my associates that no provision of law exists, authorizing a *supersedeas* in case of such an appeal.

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THE BANK OF TIPTON *et al.*, Defendants in Error, v. JNO. F. DAVIDSON, Plaintiff in Error.

Kansas City Court of Appeals, February 17, 1890.

Rehearing denied, March 1, 1890.

Modification denied, April 14, 1890.

1. **Appellate Practice:** RULE 15: ABSTRACT: SUPPLEMENTAL ABSTRACT. Rule 15 requires the abstract to set forth so much of the record as is necessary to a full understanding of all the questions presented to the appellate court for decision; and such court will not look beyond the abstract for information upon which to determine such question; and such matter must be set out in the first or original abstract and not in a so-called supplemental abstract.

2. **Injunction:** CLOUD ON TITLE: SUFFICIENCY OF PETITION. Where a petition, as in this case, shows that the defendant had of record an apparent right to sell the plaintiff's land and make a title thereto superior to the plaintiff's, but that in the light of the facts outside the record, and which rest in parol, and can only be shown by extrinsic testimony, the defendant has no such right, such petition shows that plaintiff is entitled to equitable relief and an injunction.

Appeal from the Morgan Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

A. W. Anthony, for the plaintiff in error.

(1) The petition alleges as grounds for injunction, that Davidson's claim is barred by limitation, and is fraudulent and void. If this be true, defendants in error, by their purchase of the mill property, hold the title in fee simple, and injunction is not the proper

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remedy, if any is needed. *Witthaus v. Bank*, 18 Mo. App. 181; *Dickhaus v. Olderheide*, 22 Mo. App. 76; *Drake v. Jones*, 27 Mo. 428.

B. R. Richardson and *Draffen & Williams*, for the defendants in error.

(1) The abstract of the plaintiff in error does not set out the evidence in the case. It has been repeatedly decided that this court will not examine the transcript to determine whether the finding of the circuit court is in accordance with the evidence, where the plaintiff in error has omitted to state it in his abstract. If the plaintiff in error desired to present that question, it was his duty, under the rules of this court, to set out the testimony. He has also failed to set out the rulings of the trial court during the progress of the cause. This court is, therefore, precluded from examining said matters. *Houseman v. Hope*, 20 Mo. App. 193; *Kamerick v. Castleman*, 29 Mo. App. 658; *Hyatt v. Wolfe*, 22 Mo. App. 191; *Cuomo v. St. Joseph*, 24 Mo. App. 567; *Brown v. Pope*, 28 Mo. App. 379; *Goodson v. Railroad*, 23 Mo. App. 76; *Bank v. Iron Co.*, 97 Mo. 38. (2) The abstract of the plaintiff in error, as also that of the defendants in error, gives a synopis of the pleadings, and the only point that is before this court for review, is the first one raised by the brief of plaintiff in error. This is not well taken: *First.* Under the allegations of the petition, the plaintiffs were clearly entitled to equitable interposition to restrain a sale under the mortgage, and to decree the cancellation of the same. The matter avoiding the lien of the mortgage rest largely in parol, and in such cases equity will interfere in favor of a party in possession to prevent a cloud upon his title. *Church v. Hintze*, 72 Mo. 363; *Bank v. Player*, 51 Mo. 335; *Harrington v. Utterback*, 57 Mo. 519; *Mason v. Black*, 87 Mo. 329. The cases cited by appellant do not militate against this rule. *Second.* The

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pleadings do not present any question to equitable jurisdiction. *Blair v. Railroad*, 89 Mo. 383; *Shickle v. Watts*, 94 Mo. 410.

Gill, J.—It would seem hardly necessary so often to remind lawyers and litigants of the existence of rule 15 of this court requiring "the appellant or plaintiff in error to file here, on or before the day next preceding the day on which the cause is docketed for hearing, copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision." Nor is it necessary to repeat, as so often declared, that we will not look beyond the abstract for information upon which to determine the question raised. *Foster v. Trimble*, 18 Mo. App. 394; *Goodson v. Railroad*, 23 Mo. App. 76; *City of Kansas v. O'Connor*, 36 Mo. App. 594.

The appellant or plaintiff in error, too, must set out the portion of the record relied on in his first, or original, abstract. He cannot fail or refuse to furnish such abridgment or abstract in the first instance, and then after respondent shall suggest in his brief such failure cure the defect by a so-called supplemental abstract. *Cuomo v. The City of St. Joseph*, 24 Mo. App. 567.

The plaintiff in error here has furnished nothing by his so-called abstract except a mere statement of the case with a very general statement as to the contents of the petition. To this the defendants in error have added a more definite synopsis of the pleadings; which then presents us for decision nothing but a determination of the one point raised, to-wit, as to the sufficiency of plaintiff's petition.

The material averments of the petition in this case are, in substance, that Humes Bros. were the owners of a mill and tract of land upon which the same was situated in Morgan county, Missouri; that they sold said

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property to one Zulauf and made him a deed thereof, and took his promissory notes for the purchase money; that there were five of these notes; that each was for the sum of one thousand dollars; that two of them were transferred by Humes Bros. to the Bank at Tipton, and one to Lumpee, another to one McDow, and the remaining note to the defendant Davidson; that these notes were secured by a deed of trust upon the property; that default was made in the payment of the same, and the property was sold by the trustee under said deed, and purchased by the plaintiffs who were in possession thereof; that some controversy arose as to the disposition of the money arising from the sale, and the trustee had filed a bill, asking that the holders of the notes be required to interplead and have their rights to the money in his hands settled and determined, and that this was still pending; that the defendant Davidson was about to sell said property, and had advertised the same for sale, under a pretended mortgage alleged to have been executed by Humes Bros. to the defendant and others on the tenth of November, 1871, and prior to the sale to Zulauf, and more than sixteen years before any attempt was made to foreclose the same; that said debt claimed to be secured by said mortgage, under which defendant was about to sell the lands, had been settled and extinguished; that it was also barred by the statute of limitation, and that there were pretended credits indorsed on the note, purporting to be secured by said mortgage, but that they were not made on the dates written upon the note, but were fraudulently placed thereon after the bar of the statute of limitations had attached; that said note had been settled and surrendered by the defendant to the makers thereof, long prior to the sale to the plaintiffs; that the claim under said mortgage was fraudulent, and made in collusion with Humes to extort money from the plaintiffs by casting a cloud upon their title; that after their purchase,

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the plaintiffs took possession of, and made valuable improvements on, said property with defendant's knowledge, and in ignorance of any claim upon defendant's part under said mortgage, and that the defendant knew that the plaintiffs were making said improvements under the belief that they were the sole parties interested therein. The plaintiffs ask that said pretended mortgage be cancelled and annulled, and that the defendant be enjoined from making said sale, etc.

It is quite clear, that, admitting the truth of the foregoing allegations, plaintiffs should have equitable relief to prevent and remove a cloud from their title to the real estate in question. It would seem that defendant had of record an apparent right to sell this land and make a title thereto superior to that already acquired by the plaintiffs, but in the light of the facts *outside* the record, and which rest in parol, and can only be shown by extrinsic testimony, the defendant has no such right. In such cases there is no doubt as to the right to invoke equitable relief. *Drake v. Jones*, 27 Mo. 432; *Harrington v. Utterback*, 57 Mo. 519; *Mason v. Black*, 87 Mo. 344-5.

Let the judgment of the circuit court be affirmed. All concur.

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NAT. BRUEN, Appellant, v. THE KANSAS CITY AGRICULTURAL AND HORTICULTURAL FAIR ASSOCIATION, Respondent.

Kansas City Court of Appeals, March 31, 1890.

Rehearing denied, April 14, 1890.

1. **Ownership: EARNINGS.** Whether plaintiff was the absolute owner of certain race horses, or was simply in control thereof for the season, to be used as he saw fit, he was entitled to all their earnings.

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2. **Appellate Practice:** DUTY TO REVIEW JUDGMENT ON UNDISPUTED FACTS. The material facts being undisputed, it is the duty of the appellate court to review the action of the trial court thereon and decide if its judgment is warranted by such facts.

3. **Principal and Agent:** PRINCIPAL'S RATIFICATION OF AGENT'S CONTRACT AND NOTICE AS TO DISPOSITION OF PROCEEDS: PARTNERSHIP: SALARY. Plaintiff engaged A. to travel with, enter and race certain horses for the season, and as compensation for his services A. was to receive one-half of the net winnings. In absence of winnings plaintiff was to bear all expenses, and all entries were to be made in his name. A. entered the horses at the defendant's races in the name of R. Plaintiff informed defendant the horses were his and all winnings were to be paid to him and not to A. or R. Both horses won and plaintiff demanded the winnings, but defendant paid them to R. *Held*—

(1) The arrangement between plaintiff and A. did not constitute a partnership, wanting community of all profits and losses; but made A. the agent of plaintiff.

(2) Where the principal intervenes and demands the beneficial results of a contract made by his agent, and where the third party, in face of the demand and warning by the principal, insisted upon payment over to the agent, after the agent's authority had been extinguished, then such payment was at its peril and it must respond again to the demand of the principal.

3 While the plaintiff adopts the contracts of entry, in so far as to demand benefits arising therefrom, he must also assume the burdens attached and meet the delinquent entrance fees.

Appeal from the Jackson Circuit Court.—HON. RICHARD H. FIELD, Judge.

REVERSED AND REMANDED (*with instructions*).

Crittenden, Stiles & Gilkeson, for the appellant.

(1) The facts in the case submitted being undisputed and their legal effect only in question, and there being no evidence to weigh, the appellate court may review the decision of the lower court though no declarations of law were given or refused. *Waddell v. Williams*, 50 Mo. 216; *Henry v. Bell*, 75 Mo. 194; *Douglass*

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v. Orr, 58 Mo. 573. (2) The judgment in this case being erroneous, there being no evidence to support it, and the motion for a new trial having called attention to that fact, this court can interfere "regardless of the declarations of law given, or if none were given." *Moore v. Hutchinson*, 69 Mo. 429. (3) Where an agent in fact contracts in his own name without disclosing his principal, or where one not in fact an agent, but assuming to act as an agent, makes a contract, in the one case the undisclosed principal can claim and recover the benefits of the contract, by stepping in and making himself known, and in the other the party for whom one assumes to act as agent can by ratification of the contract claim its benefits. It is only when one not in fact an agent nor assuming to act as an agent but as a principal makes a contract in respect to another's goods, that the owner thereof cannot claim the benefits under said contract, there being in such case no privity on which to found such claim. Mechem on Agency, sec. 127; *Hamlin's Appeal v. Seers*, 82 N. Y. 327; *Brainerd v. Dunning*, 30 N. Y. 211, and cases in appellant's original brief. (4) The undisputed evidence at the trial was that Abbott was to have, for his compensation, one-half of the winnings of the horse Egmont, but was not to bear any of the losses of taking him about the country in the event of his being unsuccessful. Abbott had nothing to do with the losses or expense on any account. And it has always been held in this state that an interest even in profits is not sufficient to constitute the parties partners. *Stoallings v. Baker*, 15 Mo. 481; *Campbell v. Dent*, 54 Mo. 325 and 333; *Donnell v. Harshe*, 67 Mo. 170; *Gill v. Ferris*, 82 Mo. 156-167; *Clifton v. Howard*, 15 S. W. Rep. 26. (5) It is hardly possible to mistake the position occupied by Rouse in this transaction. That he was clearly a sub-agent—Abbott's tool—all the facts and circumstances of the case illustrate.

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Gage, Ladd & Small, for the respondent.

(1) Both the instructions are bad and were properly refused because they are hypothecated upon the fact that Abbott was a mere employe, or agent, of Bruen. The nature of his relations with Bruen are stated by Bruen himself, and his statements are uncontradicted, and they show not an employment of Abbott by Bruen, nor any agency but a bailment of the horses under an agreement to divide profits, which probably made Bruen and Abbott partners in the enterprise. The court could not, without stultifying itself, call this arrangement an employment or an agency simply, and the only proper hypothecation in this respect would have been a statement of the arrangement as it appeared in the evidence. Abbott was not an employe, but worked for himself; he was not an agent, but represented himself and his own interests equally with those of Bruen. (2) The instructions were properly refused, because under Rouse's entry he, and he alone, was the party who contracted with respondent, he was the only party responsible to the respondent, and the only one to whom the respondent agreed to be responsible, and the matters of the ownership of the horses and the relations between Bruen and Abbott were entirely immaterial to the case. (3) There is no similarity between this ease and a case where a servant lets out his master's horse to service. These horses were not racing in the service of respondent, but entirely for their own use and benefit. They were as much in the service of the betters and pool-buyers at the race as of respondent. Rouse, by incurring certain obligations to respondent, secured for Egmont and Zoe K. the privilege of competing in the races and the respondent agreed to pay Rouse a certain premium in case those horses should compete and win. Rouse did not undertake that the horses should compete, and the respondent had no interest

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whatever in having them compete. Whether they did so or not the respondents got their entrance money and that was all they wanted. There was, therefore, no service rendered to respondent by those horses, and Bruen cannot recover as for services rendered. (4) The appellant in invoking the law of agency confuses the relations of Rouse to this transaction with those of Abbott. If Abbott was an agent or employe Rouse was not, and beyond Bruen's suspicion, there is no evidence of any connection or understanding between Rouse and Abbott.

Gill, J.—As to the material facts of this controversy there is no conflict, the evidence showing substantially about the following: In the spring of 1887, plaintiff Bruen, a large dealer and owner of stock and speed horses at Burlington, Iowa, engaged one Abbott to take charge of his racers for the season of 1887. Abbott was to travel with the horses, enter and trot them at the various places on the "circuit," and as compensation for his services was to receive one-half of the net winnings. If there were no winnings then all the expenses were to be borne by Bruen. It was, too, definitely understood that all entries for races should be in the name of Bruen. Among the horses thus intrusted by Bruen to Abbott was a gelding named "Egmont" and a mare "Zoe K." Abbott began his tour in June, traveling from place to place, entering and racing the animals, winning some purses, and appeared at the races advertised and held by the defendant Kansas City Fair Association, in October, 1887. At some of these races Bruen had appeared, and it seems had detected Abbott entering and racing the horses in the name of one Rouse, instead of in the name of Bruen, as instructed. Complaint was made at Des Moines and Abbott agreed not to do so again. But, on Bruen's arrival at Kansas City on October 12, he found Abbott repeating the same violation of instructions—that the

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horses Egmont and Zoe K. were that day entered and being run in Rouse's name. Thereupon Bruen gave notice to the fair association that he, Bruen, was the owner, or proprietor, of the horses thus entered in the name of Rouse—that said Rouse had no interest in the horses—was not employed by him, and that such entries were wholly unauthorized, and then and there on October 12, and 13, warned the managing officers of the association not to pay any winnings of the said Egmont and Zoe K. to said Rouse or Abbott but to pay the same to him Bruen, the owner. Egmont won a purse of five hundred dollars, and Zoe K. a purse of one hundred and twenty-five dollars. Bruen demanded the same from the defendant. The demand was refused, and the winnings (less some charges against the horses for entry fees not paid, etc.) were paid over to Rouse, and this, too, after notice given by Bruen. Thereupon Bruen brought this suit, the petition stating plaintiff's case in two counts, one for the winnings of Egmont and the other for the winnings of Zoe K. Upon a trial had before the circuit judge without a jury, the court gave judgment on the first count for the defendant, and on the second count for the plaintiff. From this judgment plaintiff has appealed to this court.

I. In the foregoing statement of facts we have intentionally eliminated matters which we deem wholly immaterial to a correct understanding of the controlling features of this controversy. It matters not whether Bruen was absolute owner of the horses Egmont and Zoe K., or was simply given them in charge and control for the racing season of 1887, to be by him used as he saw fit. Bruen was for that season the owner, and absolutely entitled to all their earnings.

And, as to the occurrences at Kansas City, it is sufficient to say that arrangements as to entrance fees were made satisfactory to the fair association, the fees and charges were paid; and the question is to whom should the association have paid the winnings, after deducting

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the admitted charges? The material facts being undisputed, it is our duty to review the action of the trial court thereon and decide if its judgment is warranted by such facts.

II. The arrangement between the plaintiff Bruen and Abbott did not constitute a partnership. It wanted the necessary community of profits and losses to effect a copartnership. Abbott was the hired agent of Bruen, and his measure of compensation was the one-half of the net earnings of the horses. Bruen was liable for all expenses in the first place. If there were no winnings, then the entire loss was Bruen's loss. If there were winnings, then Abbott was to have for his services the one-half thereof after the payment of expenses. This was not a partnership. *Bank of Odessa v. Jennings*, 18 Mo. App. 660; *Gill v. Ferris*, 82 Mo. 167; *Donnell v. Harshe*, 67 Mo. 170; *Campbell v. Dent*, 54 Mo. 325. When, then, Abbott entered the horses Egmont and Zoe K. at Kansas City in the name of Rouse he acted as agent for Bruen, but violated instructions in failing to make such entries in the name of his principal. Bruen, however, appeared after such entries were made, thus far (while complaining) ratified the agent's acts, and permitted the horses to compete, But, while thus adopting the contract of *entry*, thus made by the agent, Bruen denied the agent's authority to collect the proceeds arising from the contract of entry, and gave notice thereof to the fair association, demanding payment of the winnings, and warning the officers not to pay the same to Abbott, or his substitute Rouse.

Even though Bruen's agent had contracted with the fair association in his own name, yet, upon discovery by the association that Bruen was the principal, it was its duty, upon demand of the principal, to hold such winnings for him. Although Bruen's name did not appear in the contract of entry, he, as principal, had the right to all the benefits arising from a contract made by his agent, and might sue for and recover the

same in his own name. "The principal may by his own intervention intercept, suspend or extinguish the right of the agent under the contract." Story on Agency [9 Ed.] sec. 403. "After the principal has interposed and given notice of his claim, his right to sue cannot be afterwards defeated nor impaired by any dealings between the other party and the agent." Meacham on Agency, sec. 772; *Pitts v. Mower*, 18 Me. 361 (36 Am. Dec. 727); Story on Agency, sec. 421.

To us, then, this seems a case where the principal intervenes and demands the beneficial results of a contract made by his agent, and when the third party, in face of a demand and warning by the principal, insisted upon payment over to the agent, after the agent's authority had been extinguished, then such payment was at its peril, and it must respond again to the demand of the principal. In our opinion, then, the admitted facts of this case warrant a judgment for plaintiff on both counts of the petition. Of course, while the plaintiff adopts the contracts of entry, in so far as to demand *benefits* arising therefrom, he must also assume the *burdens* attached, and proper allowances should be made for the delinquent entrance fees admitted to aggregate two hundred and fifty-six dollars.

The judgment then of the circuit court is reversed and cause remanded with directions to enter a judgment for plaintiff on both counts of the petition; that is, five hundred dollars on the first count and one hundred and twenty-five dollars on the second count, aggregating six hundred and twenty-five dollars. From which said six hundred and twenty-five dollars defendant is entitled to have deducted the sum of two hundred and fifty-six dollars, leaving a balance due plaintiff, October 13, 1887, of three hundred and sixty-nine dollars, which, with six per cent. interest per annum, added from said October 13, 1887, should be the judgment against defendant. The other judges concur.

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40	433
44	643
40	433
51	256
52	356
40	433
54	196
54	378
40	433
77	148
79	369
79	489
40	433
83	292

GEO. W. GEORGE, Respondent, v. WABASH WESTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, March 31, 1890.

Rehearing denied, April 14, 1890.

1. **Practice:** DEMURRER TO EVIDENCE. On a demurrer to the evidence the court must indulge every inference of fact in favor of the party offering the evidence, which a jury might indulge with any degree of propriety, and though, on a review of the evidence in this case, it may be found in some respects scant, there is not such total absence thereof as authorizes the withdrawal of the case from the jury.

2. **Railroads:** CHANGE OF ROADBED: FLOW OF WATERS OF STREAM. A railway company, after having constructed its roadbed, has the right to make such changes therein, as experience may designate as proper, and this is a continuous right, but it cannot at pleasure make an improvement in its roadbed, which will interfere with the flow of the waters of a stream without reference to the rights of others.

3. **Nuisance:** FORECLOSURE PURCHASER LIABLE FOR RECEIVER'S ACTS. A purchaser of a railroad at a foreclosure sale, who had no direct agency in the act complained of, will not ordinarily be liable for an act of the receivers operating the road prior to the sale; but if the act of the receivers created a nuisance, which was in existence at the time of the purchase, and the purchaser then had notice of the acts constituting the nuisance and continued the nuisance afterwards, and in consequence thereof plaintiff's land was overflowed, rendered untillable and his crops injured, the purchaser is liable.

4. **Definitions:** NUISANCE. A nuisance, in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property, which violates the rights of another, is in an essential degree a nuisance.

5. **Nuisance:** FLOODING LAND: A CONTINUING ONE: NOTICE. The making an excavation under a railroad track, and removing the original earth thereat and thereby diverting the waters of a creek

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from its former channel and emptying them upon land theretofore dry and tillable, where said waters did not before run or flow, constitute a nuisance, and the maintenance of said excavation and its results is a continuing nuisance.

6. ——— : NOTICE : PURCHASER : PRINCIPAL AND AGENT. Written notice of the existence of a nuisance served upon the chief engineer of the former railway company cannot impart notice to a corporation (not then in existence) that subsequently purchased the railway at foreclosure sale ; but where such officer is retained in the service of the receivers, and, while so retained, acquired full knowledge of all the facts constituting the nuisance, and the continuation thereof, and is continued in the office in the service of the subsequent purchasers under such conditions as necessarily give rise to the inference that such knowledge remained fixed in his memory, when his employment by the purchaser began, then his knowledge must be deemed the knowledge of the purchaser.

7. **Instructions**: PLEADING: ISSUES. An instruction that hypothecates facts not averred in the pleadings, or enlarges the issues, or which speaks of the acts of the servants of "said railway" without reference to what corporation was meant, or that confuses and misleads the jury as to issues it was to try, is fatally erroneous.

Appeal from the Clay Circuit Court.—HON. JOHN T. CHANDLER, Special Judge.

REVERSED AND REMANDED.

Geo. S. Grover, for the appellant.

(1) As the water complained of was merely such as overflowed from the creek in time of freshets, neither its obstruction nor diversion constituted a cause of action. *Abbott v. Railroad*, 83 Mo. 271 ; *Jones v. Railroad*, 84 Mo. 151 ; *Moss v. Railroad*, 85 Mo. 86 ; *Jones v. Railroad*, 18 Mo. App. 25. (2) Any recovery, on account of the diversion of the channel in 1868, is barred by the statute of limitations. *James v. City of Kansas*, 83 Mo. 567 ; *Bird v. Railroad*, 30 Mo. App. 365. (3) As trestle 604 was constructed by the receivers, the appellant cannot be held responsible therefor. *Turner v.*

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Railroad, 74 Mo. 602; *Heath v. Railroad*, 83 Mo. 617; High on Receivers, sec. 396; High on Receivers [2. Ed.] p. 349; Beach on Receivers, sec. 721, and cases cited. (4) The appellant, being a subsequent purchaser, was not liable to the respondent for the nuisance, if such it was, erected or maintained by its predecessor in title, without notice or knowledge of the existence of such nuisance, and a reasonable opportunity thereafter in which to abate it. *Pinney v. Berry*, 61 Mo. 359; *Dickson v. Railroad*, 71 Mo. 575; *Wayland v. Railroad*, 75 Mo. 548. (5) The instructions given at the request of respondent, and by the court of its motion were clearly erroneous. Authorities cited, *supra*. (6) The verdict should have been set aside as in conflict with the instructions given by the court in behalf of appellant. *Way v. Railroad*, 73 Iowa, 463; 34 Am. & Eng. R. R. Cases, p. 286.

H. F. Simrall and *Samuel Hardwicke*, for the respondent.

(1) "The water complained of was merely such as overflowed from the creek in time of freshets," etc. There might be something in this, if it had any foundation in fact. The testimony was that the entire creek was turned in. That issue was submitted to the jury, by instructions, and under the evidence they found that way; and defendant's instruction was on that point and was given. (2) "Any recovery, on account of the diversion of the channel in 1868, is barred by the statute of limitations." So the court instructed, at their instance, except the statute of limitations was not mentioned. No damages were asked on account of the act of 1868. The fact was stated by way of inducement. (3) "As trestle number 604 was constructed by the receivers, the appellant cannot be held responsible therefor." No attempt is made to hold them responsible therefor. The receivers, by constructing

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trestle 604 and excavating the bank and original earth under it, turned the waters of Rush creek from its channel and emptied them on the lands of respondent, where there was no channel to carry the waters off, thereby creating a damaging nuisance; "and," the petition says, "defendant wilfully, and with full knowledge and notice of the facts causing said additional nuisance, continued and maintained said additional nuisance during the summer and autumn of 1887, so that Rush creek, during said summer and autumn of 1887, emptied upon the lands of plaintiff and overflowed the same, during said summer and autumn of 1887." As a result, "his crops on his said premises, for the year 1887, were totally destroyed and his land rendered untillable for said year, to plaintiff's damage," etc. This is what the suit is for—damages done by appellant during the year 1887; for the act which defendant did, because defendant "continued and maintained said additional nuisance," etc. (4) "Not liable"—"for the nuisance"—"without notice or knowledge of the existence of such nuisance and a reasonable opportunity"—"to abate it." We think the question of "knowledge," which is all that is required (*Wayland v. Railroad*, 75 Mo. 548), is pretty well settled. Officers who were in charge of the road when the receivers did that thing were in charge under the new name. Mr. Talmage, one of the engineers, who came up first to try to adjust matters, was also a witness in both courts; and Mr. McGuigan was connected with the road all the time. As to "opportunity to abate" the nuisance, they had all summer in which to do it, and they can get a very liberal compromise now, or at any future time, if they will do it.

SMITH, P. J.—This was an action commenced by the plaintiff against the defendant, in the circuit court of Clay county, for the recovery of damages. The

petition, owing to its great length, and the many superfluous and redundant allegations it contained, cannot be set forth here. It alleged that, in the year 1868, the North Missouri Railway Company, in the construction of its roadway, through Clay county, wrongfully erected an embankment across Rush creek, at two different points, so that the current thereof was diverted from its usual course, and directed and driven along the north side of the roadbed of said railway from the western to the eastern point of obstruction, where it was restored to its original channel; and where it was driven against the bank of its original channel at right angles, and said bank, not being protected in any manner against an increase in the volume of water, and its accelerated velocity, it rushed across said original channel at the last-named point, and cut a new channel, for about a half a mile further east, along said railroad, where it again reached its original channel; that in 1872 the St. Louis, Kansas City & Northern Railway Company succeeded the said North Missouri Railroad Company in the ownership of the said railroad; that in 1880 the St. Louis, Kansas City & Northern Railway Company was consolidated with the Toledo, Wabash & Western Railroad Company under the name of the Wabash, St. Louis & Pacific Railway Company; that in 1874 the property, etc., of said last-named railway company was taken possession of by receivers, under an order of the circuit court of the United States; that the said receivers, while controlling and operating said railroad, wrongfully and unnecessarily removed the embankment of its railway, and excavated below the original surface of the ground, at a point on said stream where it had cut, for itself, a new channel, as aforesaid, and constructed, in lieu thereof, a trestle about one hundred and fifty feet long, and thus wrongfully turned the waters of the stream from said channel, from the north side of said railroad, under said trestle, to

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the south side thereof, upon the lands of the plaintiff, where the waters of said stream never ran before, and where the stream had no outlet whatever, and where a lake was formed, covering some three hundred acres of land; that, on the first day of April, 1887, the defendant became the owner of said railroad property, continued and maintained said nuisance, knowingly and wilfully, and with full notice and knowledge of all the facts causing the same; that the defendant so continued and maintained said nuisance during the year of 1887, so that said stream, during the summer and autumn of that year, overflowed the lands of plaintiff, which were formerly dry lands, and not subject to overflow, by reason of which overflow his crops were totally destroyed and his land rendered untenable, for said year, etc. The answer was a general denial, and the plea of the statute of limitations. The evidence introduced at the trial tended, to some extent, to sustain the material allegations of the petition.

It is quite voluminous, and no further statement of it need be made, beyond the references that will be made to it when we come to consider the instructions. At the conclusion of the plaintiff's evidence, the defendant interposed a demurrer thereto, which was by the court overruled. The defendant offered no evidence. The court instructed the jury, at the instance of the plaintiff, as follows:

"The court instructs the jury that a water course is a stream usually flowing in a particular direction, though it need not flow continuously. It must flow in a definite channel, having a bed, sides or banks, and usually discharges itself in some other stream or body of water.

"If the jury believe from the evidence that Rush creek is a running stream of water, and that the waters of said stream were, in the year 1885, running in a channel on the north side of what is now the Wabash

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Western railroad, at a point where is now a trestle called trestle 604, and that Solon M. Humphreys and Thomas E. Tutt, as receivers, were in possession of, and operating, said railroad at said time, and that, during the year 1885, said Solon M. Humphreys and Thomas E. Tutt, while operating said railroad, made an excavation under said railroad track at a point which is now called trestle 604, and removed the original earth at said point, and thereby caused the waters of said Rush creek to be diverted from its former channel, and emptied the waters of said creek on the lands of plaintiff, and that said stream did not run or empty on said lands of plaintiff before that time, and that said stream did run on and over the said lands because of said acts, and that before that time said lands were dry bottom lands, susceptible of cultivation, and if the jury believe from the evidence that defendant obtained title to said railroad as successors of said Tutt and Humphreys, and that the defendant had knowledge or notice of said acts done by said Tutt and Humphreys, and that, during the year 1887, after the first day of April of said year, defendant continued to keep said excavation open, and thereby caused the lands of plaintiff to be overflowed during said period of said year 1887, so that plaintiff's lands were made untillable, and his crops injured or destroyed because of said change in the course of said stream, then the jury will find for the plaintiff, and assess the damages at any sum the jury may believe the plaintiff to have been damaged, not to exceed the amount claimed in the petition.

"If the jury find for the plaintiff, they will assess his damages in such sum as the rental value of said lands as were rendered wholly untillable, and the market value of such crops as were destroyed at the time they were destroyed."

The court, at the instance of defendant, gave these instructions:

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"The court instructs the jury that the plaintiff is not entitled to recover of the defendant on account of any injury which he may have sustained by reason of the construction of embankments across the channel of Rush creek, and the construction of the artificial channel in lieu thereof, by the North Missouri Railroad Company in the year 1868.

"The court instructs the jury that the plaintiff is not entitled to recover of this defendant any damages which he may have sustained by reason of the embankment of the railway being removed, and a trestle substituted instead by Humphreys and Tutt, if the jury further believe from the evidence that damages so sustained by plaintiff were occasioned by the waters of Rush creek having overflowed its banks, and having found its way to the defendant's said embankment, and there standing against it and spreading out over the adjacent low or depressed land.

"The court instructs the jury that the railroad company had the right, if it thought necessary to do so, to open the embankment at any place it was proper to do for the purpose of letting through any water which flowed, or would flow, against said embankment out of Rush creek.

"If the jury believe from the evidence that the waters of Rush creek, in times of freshet, mounted its bank, and made its way down to the right of way of the railroad, and then followed along the railroad in depressions made by the removal of dirt in the construction of the embankment, and that the waters of the creek became accustomed so to flow along the railroad, and then spread out over the low lands adjoining, and that it was accustomed to run against the railroad embankment or upon its right of way, and that the railroad company opened its embankment, and that the said water then flowed through said embankment onto the plaintiff's land, then the plaintiff is not entitled to recover.

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"The jury are instructed that the railroad company was not bound to maintain an embankment so as to protect plaintiff against the water flowing thereon.

"The court instructs the jury that if they believe from the evidence that the water by which the plaintiff was injured was the superabundant water from Rush creek, which, in times of freshet, ran along the ditch, or excavation, on the north side of the railroad, and thence through the trestle on the railroad onto plaintiff, and that such waters, after coming out of the old and ancient channel of Rush creek, and onto the north side of the right of way of the railroad, had no well-defined channel back to the ancient channel of Rush creek, that then said water was surface water, and the plaintiff is not entitled to recover in this case."

The court upon its motion gave this instruction:

"If the jury believe from the evidence that the water along the north side of the railroad bed near plaintiff's land was a well-defined stream and that defendant excavated the natural earth across its roadbed from said stream so as to change its course, and that such change caused the damage complained of by plaintiff, then they will find for plaintiff; but if they further believe that the damage so done was the result of water overflowing said banks, they will find for defendant."

The verdict of the jury was for the plaintiff, and, after an unsuccessful motion for a new trial, judgment was rendered for the plaintiff, from which defendant appealed.

I. The first ground, upon which defendant by his appeal assails the judgment, is, that the trial court erred in overruling its demurrer to the evidence. If we apply to the evidence of the plaintiff in this case the oftentimes quoted rule, "that on a demurrer to the evidence the court must indulge every inference of fact in favor of the party offering it, which a jury might

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indulge with any degree of propriety" to the evidence we must regard with disfavor this ground of defendant's assault. We cannot say that there was no evidence adduced by the plaintiff, which authorized the court to let the case go to the jury. It is true, that, in some respects, it was quite scant, but, still, there was not that total absence of evidence which authorized the withdrawal of the case, from the consideration of the triers of the fact. There was some evidence that Rush creek was a stream within legal contemplation, and that its waters which damaged the plaintiff from time to time were diverted from the accustomed channel of said creek, by the act of the receivers, in the excavation and removal of a section of the embankment, upon which the track of said railroad was situated, and thus providing a way for it to leave its accustomed channel, and pass under said railway track, and out, and upon the plaintiff's land which had previously been dry and tillable. The embankment of the railroad, at the point where it was opened by the receivers, had been, for nearly eighteen years, a barrier—a bank which restrained the waters of said creek within its accustomed channel, and from flowing south, at that point, in times of freshets, and from this fact, taken in connection with the further fact, that there existed no seeming necessity for making said opening in said embankment, or all circumstances that constituted an interference with the waters of said creek, which take the case out of the operation of the rule, for which defendant contends, laid down in *Moss v. Railroad*, 85 Mo. 86, and the other kindred cases cited by defendant, it would seem that while the making of the opening or trestle in question was an improvement, yet under the circumstances, to make it, was in contravention of the maxim, "Use your own property so as not to injure another."

It cannot be denied that a railway company, after having constructed its roadbed, has the right, subject to

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the limitations of the maxim just quoted, to make such changes therein, as experience may designate as proper, and that this is a continuous one, but the idea is not to be tolerated, that it can at pleasure make an improvement in its roadbed, which will interfere with the flow of the waters of a stream, without reference to the rights of others. Here, the evidence shows, that the receivers not only removed the embankment down to a level with the surface of the ground, but that they cut a ditch through the opening so made, to the depth of about two feet, so as to make the same equal to the depth of the bed of the creek, with which it connected. It is believed that upon no principle of law can the right of railway roadbed improvement be so far extended as to justify this. But whether the evidence was to the effect that has been stated by us, may be questioned, but that there was some evidence, the tendency of which was in that direction, we think is incontrovertible.

II. The defendant's further contention is, that it cannot be held responsible for the construction of the opening or trestle in its roadbed, of which complaint has been made. Necessarily involved in this contention, is the consideration of the propriety of the action of the trial court, in giving the plaintiff's first instruction. It was admitted by the defendant that the Wabash, St. Louis & Pacific Railway Company was, at the time of the construction of said trestle, the owner of the said railroad, and that it was at that time in the possession of, and operated by, receivers, who had been appointed by the United States circuit court for that purpose. It was further admitted, that such receivers continued in the possession of said railway property until the first day of May, 1887, when the defendant purchased it under a decree of foreclosure of a mortgage thereon. It will be seen, that defendant had no direct agency, whatever, in causing said excavation, in

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said roadbed, to be made. It is clear that the defendant would not ordinarily be liable for any act of the receivers while operating the road. *Turner v. Railroad*, 74 Mo. 602; *Heath v. Railroad*, 83 Mo. 617. But if the act of the receivers created a nuisance which was in existence at the time the defendant acquired the ownership of said railway property, and it had knowledge or notice of the acts of said receivers which constituted the nuisance, at the time of its acquisition, and continued such nuisance afterwards during the year 1887, and that, in consequence thereof, the plaintiff's lands were overflowed in that year, and his crops injured and his lands render untillable, it is liable.

A nuisance, in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property, which violates the rights of another, is, in an essential degree, a nuisance. Woods' Law of Nuisance, 1, 2. If the facts hypothecated by the plaintiff's first instruction exist, then the act of the receivers, in question, was a nuisance, and, if said change in said creek through the said roadbed was maintained by them, this was continuing the nuisance. This brings us to a more important and different question in the case under this head, which is: "If the nuisance, committed by the receivers, was a continuing one, is the defendant liable therefor, upon any ground of principle? The instruction told the jury that it was, if they found that it had notice and knowledge thereof, when it succeeded to the ownership and possession of said railway. This was a correct declaration of the law in that respect. *Pinney v. Berry*, 61 Mo. 359; *Dickson v. Railroad*, 71 Mo. 575; *Wayland v. Railroad*, 75 Mo. 548.

But it is contended, that there was no such notice, and that, therefore, the said instruction must be condemned on that account. It will not be seriously

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contended that the notice signed by Mitchell and others, which was given to the chief engineer of the Wabash, St. Louis & Pacific Railway Company, imparted to this defendant, then not in existence, was any notice of the existence of the nuisance. If there was any knowledge or notice of the existence of the said nuisance imparted to defendant, it must be looked for elsewhere. But, while the defendant had no formal notice of the existence of the nuisance, did it not have knowledge thereof, obtained in a different way? Did no officer, or agent of the defendant, who was an officer or agent of the receivers, have knowledge of the existence of the nuisance at the time of the injuries suffered by the plaintiff? The uncontradicted evidence was to the effect that Lincoln and Talmage belonged to the engineering department of the Wabash, St. Louis & Pacific Railway Company, when said creek was interfered with, by being turned through the said railroad bed and its waters made to flow upon the plaintiff's lands. As the act referred to was done by the direction of said engineers, during the time said railway was in charge and under the control of the receivers, the inference of fact, necessarily, is that they were in the employ of the receivers. McGuigan was then road master of the division of the road, where the said opening was made in said railroad bed, after the cut in the roadbed was made and while the road was in the hands of the receivers, Talmage, the chief engineer of the road, was notified of the injurious results of the act, and he went upon the ground and made an examination of the situation, and thus acquired a full knowledge of all the facts in relation thereto.

Now these officers of the railway company, then owning the railroad, were also the agents of the receivers, who were then in possession of, and operating it. These persons were likewise officers of the defendant, when the wrongs complained of were committed. Was the knowledge of these officers previously acquired,

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while they were in the service of another corporation, and while they were active agents of the receivers, the knowledge of the defendant at the time plaintiff suffered the injury and damage for which he sues? Could defendant have acquired knowledge of the matter complained of in this way? The rule is, that, when at the time of the transaction by one acting in the capacity of agent, the recollection of the fact, with notice of the fact of which it is sought to charge the principal, is present to the mind of the agent *wheresoever*, *howsoever* or *whensoever* the knowledge of such fact was obtained, such knowledge will be the knowledge of the principal, provided it come to the agent in a manner that he might communicate it, or act upon it, without being guilty of a positive violation of duty. Wade on Notice, sec. 687. While not committing ourselves to the unqualified approval of this rule, in all of its broadness, we are of the opinion, that the knowledge, obtained by defendant's officers and agents while they were the officers and agents of the defendant's immediate predecessors, and the receivers, of all the facts and circumstances respecting the acts constituting said nuisance and the continuation thereof, was acquired under such conditions as necessarily give rise to the inference that such knowledge remained fixed in their memory, when their employment by defendant began, and that their knowledge must be deemed the knowledge of defendant. *Chouteau v. Allen*, 70 Mo. 341; Wade on Notice, sec. 688-9. It is, therefore, our conclusion that the defendant had knowledge of the nuisance complained of, and that the part of the plaintiff's first instruction, relating to notice, was not without some evidence to support it.

As to the measure of damages, it may be remarked, that the instruction of the plaintiff, in respect to that matter, might have been more definite and specific, yet as the amount of damages, found by the jury, do not seem excessive we are unable to perceive that the defendant has been in any way injured in consequence

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of that. The case was not tried upon the theory of permanent or prospective injury of the plaintiff's land, but upon the theory that the action was for loss sustained, by plaintiff, of the rental value of the land, the destruction of the growing crops for the year 1887, by the continuance of the nuisance. These elements of damages were proper subjects of an instruction to the jury under the petition and evidence. *Pinney v. Berry*, 61 Mo. 359.

And as to the instruction given by the court, upon its own motion, it may be observed, that it was erroneous, in that it told the jury, that if defendant excavated the natural earth across the roadbed from said stream so as to change its course, and that such change caused the damage complained of, then they should find for plaintiff, etc., for these reasons: *First*. It does not correspond with the pleadings, for the facts hypothecated are not averred therein, *i. e.*, that defendant excavated the earth across said railroad bed, etc.; *second*, it enlarges the issues; *third*, the jury may have understood from the language employed that if said change in the said railway roadbed was made by the agents, servants and employes of said railway, without reference to what corporation or office was owning and operating it, that such change was the act of defendant; *fourth*, it was calculated to confuse and mislead the jury as to the issues which it was called upon to try. It was like a guide-board, whose fingers pointed the wrong way. Besides it was irreconcilably in conflict with the other instructions given. Its vice was not and could not be covered by the other instructions. We cannot say that the giving of it was an innocuous error. The instructions, in other respects, are unexceptionable and but for this error of the court in giving its own instruction, we should affirm the judgment of the circuit court.

The judgment is reversed and cause remanded. All concur.

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ALVIN HATTAN, Respondent, v. NEVADA MINING COMPANY, Appellant.

Kansas City Court of Appeals, April 14, 1890.

Appellate Practice: ABSTRACT: APPEAL DISMISSED. Where the appellant fails to file a printed abstract of the record setting forth so much thereof as is necessary to a full understanding of the question presented for appellate decision, the appeal will be dismissed.

Appeal from the Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

APPEAL DISMISSED.

William T. Green, for the appellant.

Robinson & Crow, for the respondent.

SMITH, P. J.—The appellant has failed to file, as required by rule 15, a printed abstract of the record, setting forth so much thereof as is necessary to a full understanding of the question presented by it for our decision, in that there is a total omission to set out the nature of the pleadings. No mention is made of the petition, answer or other pleading, or of the substance thereof. The meager abstract begins by stating that appellant objected to the introduction in evidence of the note sued upon, and that the trial court overruled such objections and permitted it to be read, and to which ruling it duly excepted. Unless we could see the answer or in some way be made aware of its nature or substance, of which there is not the slightest intimation given in the abstract, how can we determine whether the trial court erred in its said ruling? The answer, for aught that appears before us, may have been of such

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character as rendered the note admissible in the evidence. We must indulge every presumption in favor of the correctness of the ruling of the trial court, upon that question, in the absence of the record showing the contrary. If counsel, in preparing the abstracts of the record of their cases, which are brought here, would take the trouble to do so, in view of the few plain and simple rules governing the practice in this court, they would be enabled to obtain our ruling upon the questions presented by the record, and thus exempt us from the performance of a disagreeable duty.

Under rule 15, as we have construed and applied it again and again, the appeal in this case must be dismissed. *Moise v. Colcher*, 18 Mo. App. 693; *Foster v. Trimble*, 18 Mo. App. 395; *Kinney v. Springfield*, 35 Mo. App. 96; *Black v. Landis*, 35 Mo. App. 433; *Schultze v. Railroad*, 32 Mo. App. 438.

Let the appeal be dismissed. All concur.

ALBERT MCKINLEY, Respondent, v. THE CHICAGO, 40 449
SANTA FE AND CALIFORNIA RAILWAY COMPANY, 81 326
Appellant

Kansas City Court of Appeals, April 14, 1890.

Trespass: NOTICE OF PLAINTIFF'S RIGHT: LESSOR AND LESSEE: DEFENDANT'S CONTRACTOR. W., the owner, in November, by a mere parol lease, rented his farm for a year to plaintiff, who was to go into possession in March following. In January or February following, this contract was so modified as to make plaintiff an allowance for a right-of-way strip through the farm about to be sold by W. to the defendant railway company. On January 12, the defendant contracted the construction of roadbed to MacR., whose sub-contractors cleared the right of way in February, and on March 4 began the grading and completed it in the succeeding October.

Said contractors threw down the fences whereby cattle entered upon the fields cultivated by plaintiff as tenant under his renting contract. For such damage so occasioned plaintiff brought trespass against the defendant railway. *Held*—

(1) That, though defendant might be held as a co-trespasser with the contractor MacR. if, at the time of making its contract with him, it could be charged with notice of the rights of plaintiff in the land (if any), yet the law does not charge one with notice of such a lease, and prior to taking possession a tenant under a verbal lease has no estate in lands.

(2) That those engaged in the construction of the road were in no sense the servants of the defendant.

(3) That the provisions of the contract that the work should be performed under the supervision of defendant's chief engineer, at whose directions objectionable employes should be discharged, do not have the effect to make the contractor and his employes the servants of the defendant.

Appeal from the Chariton Circuit Court.—Hon. G. D. Burgess, Judge.

Reversed.

Statement by the court.

This was an action in trespass to recover damages caused by the alleged unlawful entry by defendant, during the construction of its railroad, upon a farm of one hundred and sixty acres in Chariton county, Missouri. The gist of the action as alleged in the petition was that the defendant, by its agents, etc., "wrongfully and forcibly entered upon said premises, and then and there threw down, and removed and destroyed the fences inclosing said land and the cross fences thereto belonging, and wrongfully proceeded to construct a railroad entirely through and over said tract," etc. The answer of the defendant put in issue the allegations in the petition and also alleged that plaintiff had received compensation for the damage to his interest in the land upon which the railroad was constructed.

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The defendant on January 12, 1887, entered into a contract with Williams, MacRitchie, Nichol and Williams, for the clearing of the right of way and the grading of the roadbed over the land in controversy. They in turn sublet to Elliott and Huss the clearing and grading of the property in controversy. In February, 1887, Elliott and Huss did the work of clearing the right of way on this property, and on March 4, following they went upon the right of way with their outfit and began the grading of the roadbed. They completed the work the following October or November. In entering upon the land they tore down the fences upon the right of way.

The owner of the land was E. J. Woods, wife of O. H. Woods. Plaintiff entered into a contract with Woods in November of 1886, for the renting of the farm for 1887, under which he took possession on March 1, 1887. In January or February, 1887, this contract was modified by plaintiff and Woods by mutual consent. Woods was negotiating for a sale of the right of way through the farm, and it was agreed between him and plaintiff that an allowance should be made the latter for the taking of the right-of-way strip. In the spring and summer of 1887 the fences were torn down by the contractors and their employes, in consequence of which cattle entered upon the fields being cultivated by plaintiff as tenant under his renting aforesaid. There was a verdict and judgment for plaintiff, and defendant appeals.

Gardiner Lathrop, *Kinley & Wallace* and *S. W. Moore*, for the appellant.

(1) Instruction number 3 asked by plaintiff and given does not properly declare the law. It is predicated upon facts which show a lawful entry, and which, if conceded, are fatal to this action of trespass. Plaintiff's own evidence showed that he had made settlement with his landlord for the loss of the strip of

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ground constituting the right of way, and the putting of the ground in bad shape, before the construction of the road began, or before the fences were torn down. So far as he was concerned the entry was lawful. This action being in trespass for an unlawful entry, plaintiff cannot recover. Mills Em. Dom., sec. 142; *Rossiter v. Russell*, 18 N. H. 73; *Railroad v. Thompson*, 18 B. Mon. 735; *Railroad v. Jarrell*, 60 Texas, 267; *Thompson v. Railroad*, 21 S. C. 420; *Killrell v. Railroad*, 56 Vt. 96; *St. Julien v. Railroad*, 33 Am. & Eng. R. R. Cases, 92; Pierce on Railroads, pp. 169, 230; *Kanaga v. Railroad*, 76 Mo. 207. (2) Defendant's instruction number 1 was improperly refused. It correctly declared the law; there was evidence to warrant it, and it should have been given. Conceding the right to enter upon the land as against this plaintiff, the contractors had a legal right to tear down the fence; as is said in *Clark v. Railroad*, 36 Mo. 222: "They had the lawful power and the right to construct the railroad through the plaintiff's farm and to pull down plaintiff's fences for that purpose." The entry being lawful, the contractors, and not this defendant, would be liable for any damage in the nature of trespass. *Hughes v. Railroad*, 15 Am. & Eng. R. R. Cases, 110; *Blumb v. City*, 84 Mo. 42; *Steele v. Railroad*, 32 Pa. St. 366; *McCoffrey v. Railroad*, 61 N. Y. 178; *Railroad v. Fitzsimmons*, 18 Kan. 34; *Cuff v. Railroad*, 6 Vroom, 17; *Pawlett v. Railroad*, 28 Vt. 297; *Reedie v. Railroad*, 4 Exch. 244; *Hobbett v. Railroad*, 4 Exch. 254; *Hunt v. Railroad*, 51 Pa. St. 475; *Eaton v. Railroad*, 59 Me. 520; *Schula v. Railroad*, 38 Barb. 653; *Callahan v. Railroad*, 23 Iowa, 562; *Tibbetts v. Railroad*, 62 Me. 437; *Clark v. Railroad*, 36 Mo. 202; *Ullman v. Railroad*, 67 Mo. 118; *Clark v. Railroad*, 28 Vt. 103; *King v. Railroad*, 66 N. Y. 181; *Steele v. Railroad*, 16 C. B. 550; *Hitte v. Railroad*, 29 Am. & Eng. R. R. Cases, 586. (3) The plaintiff's evidence to show any possession in him at

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the time of the entry was set out in the petition. His evidence showed that the contractors had taken possession of the right of way in February, 1887, and had commenced the clearing and grubbing. Plaintiff did not go upon the farm until March 1, 1887. This is fatal to this action. (4) Upon the whole evidence the judgment should have been for the defendant. The action was not to recover on a statutory liability for failure to fence; that statute was not invoked in the petition, "either by reference to its title, the date of its passage, subject-matter or otherwise; nor did the petition state facts necessary to invoke the liability or duty imposed by that statute, or in any way show that the same was in the mind of the pleader." *Hall v. Railroad*, 97 Mo. 68. An action to recover for depredation of stock, caused by failure to maintain cattle-guard, is entirely different and distinct from an action of trespass. *Railroad v. Hayes*, 13 Am. & Eng. R. R. Cases, 597. There was no obligation to fence imposed upon the defendant independent of the statute. Wood on Railway Law, p. 1543. The action was purely one of trespass for an unlawful and forcible entry. The evidence showed a lawful entry. Defendant's instruction number 3 should have been given. (5) Even if the court should hold that the petition sufficiently invoked the statute requiring railroads to fence their rights of way, still plaintiff's instructions were erroneous, because they ignored the facts that defendant's duty to fence would not begin until a reasonable time had elapsed for the building of the fence. The liability would not commence until the duty to fence began. *Silver v. Railroad*, 78 Mo. 528. (6) Plaintiff's petition failed to allege that the fence inclosing the land was a lawful fence. This failure was not supplied by the evidence. There could be no liability for depredations of stock without allegation and proof that plaintiff's fence was a lawful one. R. S. 1889; *Mann v. Williamson*, 70 Mo. 661. (7) Even

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if the entry were unlawful there is nothing to show that defendant authorized or consented to it. There can be no recovery in the absence of such showing. *Wattmeyer v. Railroad*, 30 Am. & Eng. R. R. Cases; *Steele v. Railroad*, 16 C. B. 549; *Hughes v. Railroad*, 39 Ohio St. 461; *Eaton v. Railroad*, 59 Me. 520; *Clark v. Railroad*, 36 Mo. 202.

Crawley & Son, for the respondent.

(1) The action of trespass being the remedy given by law for injuries to the possession, plaintiff below was entitled to maintain this action against the persons who tore down his fences, unless they are those by whose direction or for whose benefit it was done are able to justify: *First*. Under authority of law; or, *second*, under license from the tenant. 1 Redfield on Railways [5 Ed.] p. 362; 3 Sutherland on Damages, pp. 365, 447; Bliss on Code Pleading, sec. 22; Cooley on Torts, p. 302; *Biddle v. Hussman*, 23 Mo. 597; *Ullman v. Railroad*, 67 Mo. 118; R. S. 1879, sec. 2543; Cooley on Torts, p. 316; *Powers v. Hammert*, 51 Mo. 136; *Ring v. Bridge Co.*, 57 Mo. 497; *Walthen v. Warner*, 25 Mo. 277; *Kingsland v. Clark*, 24 Mo. 24; (2) The testimony discloses facts sufficient to fix the liability of defendant company as a principal in the trespass. The fences were thrown down by persons engaged in the construction of its road. It was represented there by an engineer having general supervision of the work, who knew of and accepted the avails of said trespass on behalf of the company. In such case the company is liable as a joint tort-feasor, with the contractor or sub-contractor and his servants. The doctrine of *respondeat superior* is not involved. 1 Redfield on Railways [5 Ed.] p. 528; Field on Private Corporations [2 Ed.] sec. 283, p. 434; 2 Morawetz on Private Corporations [2 Ed.] sec. 725, *et seq.;* 1 Sutherland on Damages, p. 211; *Williamson v. Fischer*, 50 Mo. 198; *Ullman v. Railroad*, 67 Mo.

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118. Particular attention is called to the decision last cited. There the distinction is made clear between the case of *Clark v. Railroad*, 36 Mo. 202, cited and relied on by appellant, and the case now in hand. (3) From what has preceded, it follows that the instructions, asked by plaintiff below, were properly given, and instructions 1, 2 and 3, asked by defendant, were properly refused. The instructions given, when taken together, present the law more favorably to appellant than the authorities warrant. Whatever error was committed in that regard was in appellant's favor. There is no merit in the point that the outside fence was not proven to be a lawful fence, or that respondent could have protected himself afterward by building new fences on each side of the right of way. A trespasser has no better right to pull down a five-rail fence than a ten-rail fence, staked and ridered; and, whatever may have formerly been the view of the supreme court of this state, it is now held that the obligation upon a railway company to fence the sides of its track is imposed not only for the purpose of preventing animals from coming onto the track from adjacent lands, but also to prevent animals from going onto such lands off of the track. This fencing is required to be done within a reasonable time; and, while plaintiff below was not entitled to recover on the ground of the company's neglect to fence its track for more than eight months after the destruction of his fences, yet this was the company's fault and not his. This duty is said to begin as soon as the danger of injury to property begins. Since the decision of *Clark v. Railroad*, 36 Mo. 202, so urgently pressed upon the court's attention by appellant here, the statute in regard to fencing has been materially changed; thereby making the *Clark case* an all-round back number. *Silver v. Railroad*, 18 Mo. 528; s. c., 21 Mo. App. 5; *Donovan v. Railroad*, 89 Mo. 147.

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Ellison, J.—If defendant could on January 12, 1887, the date it let the contract of construction of the road, be charged with knowledge or notice of plaintiff's rights in the land (if any he had, not having yet taken possession under his lease), it would seem under the cases of *Ullman v. Railroad*, 67 Mo. 112 and *Williamson v. Fischer*, 50 Mo. 198, that it would be held as a co-trespasser with the contractors under the idea that it had directed the trespass. That is, it would be held to have contracted for, and directed a trespass against the rights of the tenant. The case shows that defendant at the date of its contract with the contractors, January 12, 1887, had the consent of Woods, the owner of the land, to construct the road, and would not, therefore, under the case of *Clark v. Railroad*, 36 Mo. 202, and the cases above cited, have been liable to him, had he remained in possession. The question, then, on this branch of the case is, did defendant have notice of any right existing in plaintiff at the time it acted in the matter. Our conclusion is it did not. Plaintiff's contract of renting, though entered into in November preceding defendant's contract, was a mere parol lease for a term not more than a year, and we are not aware of any law charging any one with notice of such lease, at least prior to taking possession under it. Prior to taking possession a tenant under a verbal lease has no estate in the lands. *Union Bank v. Gitting*, Md. 181; *Fincher v. Phillips*, decided this term. So then it appears that at the time defendant took its only action in the matter, viz., at the date of the contract, it committed no wrong against plaintiff for the reason that at that time he had no estate in the land, and whatever right, if any, he may have had was not known to defendant who was dealing by consent of the owner.

But it is plaintiff's theory that those engaged in the construction of the road were defendant's servants. We do not think so. The road was being built for

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defendant, it is true, but defendant had contracted the construction to other parties who could in no sense be called its servants, unless by reason of a provision in the contract thereinafter set out. They were to build the roadbed ready for the superstructure according to the terms of the contract and deliver it over by a certain date. They employed their own hands and teams and furnished their own material, implements and tools. They were independent contractors. The relation of master and servant did not exist. *Barry v. City of St. Louis*, 17 Mo. 121: *Hilsdorf v. City of St. Louis*, 45 Mo. 94; *Clark v. Railroad*, 36 Mo. 202.

This contract, it is true, provides that "the work shall be executed under the direction and supervision of the chief engineer of said railway company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under the contract shall be determined." It further provides that, "If any foreman, agent, mechanic or laborer, employed by the contractors, shall, in the opinion of the engineer, execute his work in an unfaithful or unskilful manner, he shall forthwith, by the direction of the engineer, be discharged." These provisions in the contract are quite similar to those in *Blumb v. City of Kansas*, 84 Mo. 112. That case is controlling authority here, and we feel bound to follow it. There the city had power to suspend the work. The work was under the general supervision of the city engineer, and there, as in this case, the contractor was to discharge any workman whom the engineer directed to be discharged. We see no way by which plaintiff's case can stand, and, therefore, feel constrained to reverse the judgment. All concur.

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JACKSON BANKS, Respondent, v. WABASH WESTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, April 14, 1890.

1. **Negligence: WHAT IS PROXIMATE CAUSE: LIABILITY FOR.** In determining what is the proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act; and the guilty actor will be liable for such immediate result as ought or would have been expected or anticipated by a reasonably prudent person as likely to flow from the commission of the wrongful act. On the facts of this case, as found by the jury, it is *held*, that a defective handle of a hand car negligently furnished by defendant to plaintiff, its servant, was the proximate cause of the plaintiff's injury, and defendant is liable therefor, as the immediate, natural and probable consequence of the negligent act.

2. ———: MASTER AND SERVANT: ALITER EGO: FOREMAN OF SECTION GANG. Under the facts of this case, it is *held*, that the foreman of the section "gang" in charge of the hand car was *pro hac vice* the defendant corporation, and his full knowledge of the condition of the hand-car handle as well as the situation of an accompanying hand car was the knowledge of the defendant.

3. ———: CONTRIBUTORY NEGLIGENCE: MASTER AND SERVANT: DEFECTIVE IMPLEMENTS: INSPECTION. The duty of inspecting implements furnished for use by the master does not rest upon the servant; but he has the right to assume, in the absence of knowledge to the contrary, that the implement is reasonably safe. If there are latent defects of which he has no knowledge, or which are not obvious to him while using ordinary care and observation, then he does not assume the risks attendant thereon. (Instructions set out in the opinion.)

Appeal from the Chariton Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

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H. S. Priest, for the appellant.

(1) The demurrer to plaintiff's evidence should have been sustained: *First.* Because the breaking of the car handle was not the proximate cause of his injuries. He was not hurt by the fall from the car. The petition alleges, and the proof shows, that his injuries were caused by being run over by the hand car, which, through chance, was following the one from which he fell. The car which injured him had no connection with either the crew or the car from which he fell. *Railroad v. Trick*, 34 Am. & Eng. R. R. Cases, 549; *Brown v. Railroad*, 20 Mo. App. 222; *Marble Co. v. Worcester*, 4 Gray, 395; *Railroad v. Locke*, 112 Ind. 404; *Livie v. Jansen*, 12 East. 648; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad*, 13 Gray, 481; *Railroad v. Reeves*, 10 Wall. 176; *Hoadley v. Railroad*, 115 Mass. 304; *Daniel v. Ballentine*, 23 Ohio St. 523. *Second.* Either one of the two facts are true in this case, that the defect in the handle was patent or ascertainable by inspection, or it was so concealed as not to be discernible by an ordinarily careful inspection. In neither case is the defendant liable, because in the former the handle was constantly before plaintiff's observation, and his daily use was more efficient in revealing the weakness or insufficiency of the handle than any inspection the defendant was required to make; in the latter, the defect was not revealed by plaintiff's tests, and, therefore, there is no proof that any ordinarily careful inspection would have revealed it. This, therefore, is a case where upon the evidence the servant had not only equal, but greater, means and opportunities in the discharge of his duties of knowing of the defect than the master; and the master is not, therefore, liable. *Hayden v. Mfg. Co.*, 29 Conn. 548; *Ballou v. Railroad*, 54 Wis. 259; s. c., 41 Am. Rep. 31; *Way v. Railroad*, 40 Iowa, 341; *Kroy v.*

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Railroad, 32 Iowa, 357; *McGlynn v. Brodie*, 31 Cal. 376; *Devitt v. Railroad*, 50 Mo. 302; *Dillon v. Railroad*, 3 Dill. (Cir. Ct. Rep.) 320; *Sullivan v. Mfg. Co.*, 113 Mass. 396; *Railroad v. Black*, 88 Ill. 112; Wood's Master & Servant, sec. 419; *Huffman v. Railroad*, 78 Mo. 50; *Railroad v. Jewell*, 46 Ill. 90; *Railroad v. Thomas*, 42 Ala. 672; *Railroad v. Doyle*, 49 Tex. 190; *Railroad v. Kenney*, 58 Ga. 485; *Wonder v. Railroad*, 32 Md. 411; *Smith v. Railroad*, 42 Wis. 520. *Third.* It was the fault of plaintiff and his fellows that handle had not been removed. They knew that it was weak, and should have taken it out and put in the new one which had been supplied them for that purpose; or, if this was not the case, the defect was a concealed one, and, when they did not discover it by constant testing in use, the master is not chargeable with neglect in failing to discover the defect, even if, under the circumstances of this case, it was required to inspect. (2) Plaintiff's first instruction is abstract and misleading. It announces the doctrine that, if the plaintiff did not actually know that the car was defective or unsafe, he was not guilty of negligence by continuing its use however defective and unsafe it may have been. That he had the right to rely upon the duty of defendant to furnish him suitable and sufficient machinery. Such is not the law with reference especially to the facts of this case. The master is exempt from liability, if the servant, by the exercise of ordinary care in the use of the implement could have known of the defect, or if the servant had as good or better opportunity as he of knowing of the defect. To say that the servant had the right to rely upon a duty of the master to furnish safe and sufficient machinery, is to make the master a guarantor of the machinery. (3) The second instruction is wrong because: *First.* The evidence does not justify it. *Second.* It left the question of proximate cause to the determination of the jury upon undisputed facts. It is

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conceded that plaintiff was injured, not by his fall, but by the other car running over him after he had fallen. The cause of his injury was a question of law, not of fact. *Henry v. Railroad*, 76 Mo. 288.

A. W. Mullins and *Tyson S. Dines*, for the respondent.

(1) The demurrer to plaintiff's evidence was properly refused. The breaking handle was the proximate cause of plaintiff's injuries. *Waldhier v. Railroad*, 87 Mo. 37; *Boggs v. Railroad*, 18 Mo. App. 274; *Nagel v. Railroad*, 75 Mo. 653; *Schmidt v. Railroad*, 83 Ill. 405–411; *Powell v. Devinney*, 3 Cush. 301; *Brown v. Railroad*, 20 Mo. App. 222; *Hickman v. Railroad*, 22 Mo. App. 344. It does not follow, because the hand car was old and defective, and plaintiff knew thereof, that he was bound to pursue the inquiry and determine for himself, and at his own peril, whether the handle was, or was not, fit for use. *Devlin v. Railroad*, 87 Mo. 545; Wood's Law of Master and Servant, sec. 376. In each of the two last-named authorities, emphasis is laid upon the statement that, not only the defect but the danger must be known to the servant. Also see *Waldhier v. Railroad*, cited, *supra*. The servant was not required to inspect the machinery furnished him, but had the right to assume that it was safe and sufficient. *Porter v. Railroad*, 60 Mo. 160; *Gibson v. Railroad*, 52 Mo. 372. This hand car was under the charge and control of the boss. He ordered the repairs. The section hand had nothing to do with these matters. In the eye of the law, this boss was the railway company. His failure to replace the defective handle with a new one was the failure of the railway company. *Clowers v. Railroad*, 21 Mo. App. 213. (2) Plaintiff's instructions announce the law correctly. The first instruction has been approved too many times in this state to be

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called in question now. It merely throws upon the railway company the burden of inspecting its machinery. Taken in connection with the second instruction given for defendant, the objection that it makes defendant a guarantor of the machinery becomes frivolous and nonsensical. *Porter v. Railroad*, 60 Mo. 160, and cases therein cited; s. c., 71 Mo. 66, and cases there cited; *Conroy v. Vulcan Works*, 62 Mo. 35. (3) The second instruction is right. It is based upon the facts alleged in the petition. The case of *Henry v. Railroad*, 76 Mo. 288, cited by defendant, is not in point; in that case the alleged wrongful act was not the approximate cause of the injury. This second instruction of plaintiff's even goes further than the law, in defendant's favor, by requiring not only that said defect be unknown to plaintiff, but also that "it could not have been known by ordinary care or caution on his part." *Siela v. Railroad*, 82 Mo. 430; *Covey v. Railroad*, 86 Mo. 635; *Lewis v. Railroad*, 59 Mo. 495; *McMillen v. Brick Works*, 6 Mo. App. 434.

Gill, J.—On and prior to June 12, 1888, plaintiff Banks was in the employ of defendant, the Wabash Railway Company, as a section hand. He had been so engaged for about two and a half months. One Summers was the foreman or boss of the "gang," consisting in all of four men. On the morning of said June 12, this gang, under the command and control of Summers, started on a hand car, furnished by defendant for their use, down the track of the road from Dalton to prosecute their work; and along with the Summers gang went another gang, called an "extra." This extra gang, with their hand car, followed the Summers car and crowded close up to the forward car, leaving, it seems, not more than twenty to thirty feet between the cars when in motion. The two bosses rode together on the forward car. Plaintiff Banks worked one of the handles in the rear of the forward car, his face to the

front. After proceeding a short distance, Summers, the foreman, desiring greater speed, called out to those propelling the hand-car, "Let's go," meaning thereby to urge the car forward. Thereupon Banks exerted himself by two or three hard pulls, the wooden handle broke short off "where it entered an iron collar or band, and he was precipitated backwards, falling immediately in rear of the Summers car onto the track, and was instantly run upon and over by the hand car following. As a result the plaintiff was seriously injured, and for the damages thus occasioned this action was brought, resulting in a verdict and judgment for the plaintiff in the circuit court in the sum of two thousand dollars, and defendant has appealed.

As will be readily surmised the negligence charged in the petition is that defendant carelessly and wrongfully furnished the plaintiff, for use in said work, a defective hand car, the particular matter of complaint being that the handle, adjusted to the lever for propelling the car, was defective, insecure and broken, of which plaintiff had no knowledge and which was known to defendant, or might have been known by the exercise of proper care on its part. The defense was a general denial as to the material allegations of the petition with a plea of contributory negligence.

I. The chief matter of complaint, and upon which counsel for defendant rely for a reversal, is, that a demurrer to the evidence should have been sustained, because it is urged the carelessly furnishing a defective and unsafe handle to the hand car was not the *proximate cause* of the plaintiff's injuries. In the consideration of this question we were furnished at the hearing with an able and exhaustive oral argument by defendant's counsel, followed by a like printed brief and citation of authorities by attorneys of both sides. As a consequence we have read and reflected over a great number of adjudicated cases on "proximate cause," and

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can but remark how futile the effort to announce rules at all times applicable to the varied circumstances of all cases. For a definition of *proximate cause*, and one suited to the circumstances of this case, we quote from a late Pennsylvania decision, cited by defendant's counsel: "In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." *Hoag v. Railroad*, 85 Pa. St. 292, cited with approval in *Railroad v. Trich*, 34 Am. & Eng. R. R. Cases, p. 551. The negligent act established, the guilty actor will be liable for the immediate result which ought to have been expected, or rather would have been anticipated, by a reasonably prudent person, as likely to flow from the commission of said wrongful act. *Brown v. Railroad*, 20 Mo. App. 227; *Nagel v. Railroad*, 75 Mo. 661; *Boggs v. Railroad*, 18 Mo. App. 278; *Clowers v. Railroad*, 21 Mo. App. 213.

It matters not that other concurrent causes (not arising from plaintiff's fault) may co-operate in producing the damages, or in the aggravation thereof, the party originally moving and guilty of the negligent act which sets in motion the concurrent condition of things is liable for the damage thus inflicted. *McDermott v. Railroad*, 87 Mo. 302; *Sanderson v. Holland*, 39 Mo. App. 233.

Applying now these principles to the facts of this case, as they have been found by the jury, we must conclude that the defective handle to the hand car was the direct and proximate cause of plaintiff's injuries. The negligence charged in the petition, and found by the jury, is, that defendant furnished a broken, defective and unsafe handle with which plaintiff was required to propel the hand car, and that the defendant *knew* the

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condition of such handle, or (which is the same under the law) could have known thereof by the exercise of ordinary care. Thus furnishing such defective and unsafe appliance then, for the use of this section hand, was a negligent act; and defendant is chargeable with all injuries or damages resulting therefrom, such as, under the circumstances, defendant as a prudent, careful person might anticipate.

The foreman, or boss, Summers, in charge of this gang and hand car, was, at the time, the representative of the Wabash road. He was *pro hac vice* the corporation, present at the time; and his full knowledge of the condition of the handle, and its dangerous condition, as well as the situation of the two hand cars then in motion, was the knowledge of the railroad company. *Covey v. Railroad*, 27 Mo. App. 178; *Moore v. Railroad*, 85 Mo. 588; *McDermott v. Railroad*, 87 Mo. 294; *Ischer v. Bridge Co.*, 95 Mo. 266. The defendant company then was, on the morning of June 12, 1888, requiring and permitting the plaintiff to operate the hand car with a weak and defective lever which might at any time break and throw plaintiff from the car onto the track. Defendant knew, too, the close proximity of the hand car following, and might reasonably anticipate that, if the handle broke and plaintiff should be thereby cast onto the track, the car following would run upon and crush the plaintiff. Here the defendant railroad company was fully cognizant of the condition of things, and was in truth responsible for that condition.

It would not be denied that if the company had negligently furnished a defective handle, and if plaintiff (without fault on his part) had, while in the use thereof, broken the same and had fallen in front of his own moving car, that the plaintiff could recover for injuries thus inflicted by the car passing over his body. This was the case as reported in 21 Mo. App. 213. By what process of reasoning is that case (in every substantial

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requirement similar to this) to be distinguished from this? There, as here, the negligence of the company consisted in its failure to provide a sufficient and sound handle to a hand car, and the plaintiff Clowers, while using the same, broke the handle, was thrown upon the track in front of the hand car on which he was riding, run over and injured. If the consequence there was one to be expected as likely to flow from the negligent act of furnishing a defective handle, and for which the company was responsible, why was not the consequence here equally to be anticipated by a reasonably prudent person? The boss Summers fully aware of the condition of things at the time he required the plaintiff to use the broken handle, knowing that another car was following in rapid pace only a few feet in the rear of his own car, could but anticipate that if the handle broke the plaintiff Banks would be cast backward to the track and run over before possible to stop the rear car. In the language, then, of the supreme court of Pennsylvania (*supra*), we hold that the injuries received by the plaintiff were the "natural and probable consequences of defendant's negligence, and were such consequences as, under the surrounding circumstances of the case, might and ought to have been foreseen by the defendant wrongdoer, as likely to flow from said negligent act," and that, therefore, the defective handle was the proximate cause of plaintiff's injuries.

II. The remaining reason urged why plaintiff, under the evidence, should not be entitled to recover, is, that, admitting the defect in the handle, plaintiff had as great or greater opportunities of knowing the insufficiency and imperfect condition thereof as did the defendant, and that, therefore, plaintiff was guilty of contributory negligence in failing to observe its weakened and unsafe condition. On this branch of the case the trial court gave to the jury the following, among other, instructions: "2. The court, on motion of plaintiff, instructed the jury that if they believed from the

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evidence, that on or about the twelfth day of June, 1888, plaintiff was in the employment of the defendant, and that, while in the discharge of his duties as such employe, he was, without carelessness or negligence on his part, which contributed directly thereto, thrown from the defendant's hand car and injured, by reason of the breaking of the handle of said hand car; that said handle of said hand car was at said time defective and unsafe; that the defective or unsafe condition of said handle was unknown to plaintiff, and could not have been known by ordinary care or caution on his part, but was known to defendant, or might have been known to defendant by the exercise of reasonable caution and diligence on the part of defendant, then the jury will find for the plaintiff.

"3. It was not incumbent upon plaintiff, while in defendant's employ, to search for latent or hidden defects in the implements furnished to him by defendant, and, unless by ordinary care and caution the defect could have been discovered by plaintiff, he had a right to assume that the hand car furnished for his use by defendant was safe and sufficient for the purpose of his employment."

And, on motion of defendant, the court gave the following:

"1. The jury are instructed that the proof by the plaintiff that the handle of the hand car broke, and that plaintiff was injured, does not of itself make a *prima facie* case for the plaintiff against the defendant or entitle the plaintiff to recover, nor does the mere proof that the handle, after it was broken, bore evidence of having been previously cracked entitle the plaintiff to recover.

"2. If the defect in the handle of the hand car was open to observation in the ordinary use of the car, or was such as one using the car for the purposes for which it was intended to be used would by such use be constantly testing its sufficiency, and would thereby have

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as good an opportunity to discover or know of its safety or deficiency as one making an ordinary careful inspection of the car without putting it to tests, then the plaintiff cannot recover in this case.

"3. The jury are instructed that the law does not require the defendant to furnish to its employes machinery that is absolutely safe, nor does it hold the defendant liable for all injuries which may befall its employes in the use of the machinery and tools furnished them, by reason of breakage or defects in such machinery; but the law only requires of the defendant to use ordinary care in furnishing reasonable and safe machinery and tools for the work to which they are put, and maintaining them in a reasonably safe and suitable condition."

"5. If the jury believe from the evidence that the handle of the hand-car lever was defective, yet if they further believe that such was so concealed or hidden as not to be discovered by an ordinarily careful inspection of such handle, then your verdict must be for the defendant."

The foregoing instructions comprise every feature of defense to which defendant was entitled. Said declarations of the law are couched, too, in plain, concise and direct language; and as a whole are exceedingly favorable to the defendant. The defect in this handle consisted in an old crack just where the wooden portion entered an iron collar, where the wood handle seemed to have been for sometime broken quite half off. The defect, as some of the evidence tended to show, was of that character not discernible from the casual observation attending the use of the handle, but one that could, and would be, detected by inspection. Now, as the jury was told, the duty of inspection did not rest on plaintiff. He had the right to assume, in the absence of knowledge to the contrary, that the handle for working the car was reasonably safe and sufficient for the

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purpose intended. If there were latent defects of which he had no knowledge, or if defects existed which were not obvious to him while using ordinary care and observation in the use of the handle, then plaintiff, while working for defendant, did not assume the risks attending such use. *Clowers v. Railroad*, 21 Mo. App. 213; *Porter v. Railroad*, 60 Mo. 162. The servant assumes risks attending the use of defective machinery only when he may have knowledge of such defect, or when he might know thereof by the ordinary exercise of his senses. "He is not bound to search for danger, except as to those risks that are patent to ordinary observation; he has the right to rely upon the judgment and discretion of his master and that he will fully perform his duty towards him." Wood's Master & Servant, sec. 376; *Devlin v. Railroad*, 87 Mo. 545; *Goins v. Railroad*, 37 Mo. App. 221; *Porter v. Railroad*, 71 Mo. 66.

Without more, we must say, that as the jury (on sufficient evidence as we find) determined the questions of fact, raised in the foregoing instructions, against the defendant, the last point made by defendant's counsel is held against defendant. We, therefore, affirm the judgment of the circuit court. All concur.

J. W. Warren *et al.*, Respondents, v. Constantia Gibson *et al.*, Appellants.

Kansas City Court of Appeals, April 14, 1890.

1. **Public Roads:** OBJECTIONS TO PROCEEDINGS: DESCRIPTION: TOWNSHIP CLERK: DE FACTO MEMBERS OF BOARD. The following objections to the proceedings to establish a new road are *held* invalid in this case, to-wit:
   (1) That the description was insufficient, where there could be no trouble in marking out the exact line therefrom.

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(2) That the county court refused to command the clerk of township board to have his record say that the petition was not publicly read, when the court found the fact otherwise.

(3) That a member of the joint council board was not regularly commissioned.

2. ——— : NOTICE. Notice when a petition for a new road will be presented to the township board need not be signed by any one.

3. ——— : OATH OF COMMISSIONERS. The statute controlling proceedings before township boards for opening new roads does not require commissioners to take and subscribe an oath before proceeding to assess damages, but only demands them to make their report under oath.

4. ——— : MORTGAGEE NOT A PARTY TO PROCEEDINGS. The mortgagor while in possession is to be regarded as the owner of the land for the purpose of condemning it for a public road, and a mortgagee does not come under the designation of "owners" of the land taken, and is not a necessary party to the proceedings.

Appeal from the Cass Circuit Court.—HON. CHAS. W. SLOAN, Judge.

AFFIRMED.

Oscar W. Byram, for the appellants.

(1) The petition is insufficient. It does not describe the land over which the road is to pass. R. S. 1889, secs. 8547, 8548, 8549. The petition does not state the road is a public necessity, and Jarvis-Conklin Mortgage Company is not made a party to the suit. They are mortgagees. (2) The petition shall be presented to the board of directors of each township interested: Said petition and notice to be as in other cases (in like manner). Every petition and notice to be the same as in one township, so all land-owners may have notice, and know that the same petition and notice will be presented to each township board interested on the same day. Three petitions were necessary. The notice ought to be signed by the petitioners. In this

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case the petitioners did not sign the notice, signed by Whitsett & Jarrott, attorneys for petitioners. R. S. 1889, sec. 8554. (3) The joint township board, in their order to the surveyor, did not describe the land over which the road was to pass, nor even give the surveyor the names of the land-owners. R. S. 1889, sec. 8549; *Anderson v. Pemberton*, 89 Mo. 64; *Railroad v. Young*, 96 Mo. 43. The surveyor did not describe the land in his report. (4) The commissioners that assessed damages on the fourth day of August, 1888, were not sworn before they entered upon their duties. *Anderson v. Pemberton*, 89 Mo. 64. (5) Jarvis-Conklin Mortgage Company ought to have been made parties to the suit. Section 8547 provides "* * * and if, for a new road, the names of owners of land, if known, over which the road is to pass. * * *" The term owner in this statute includes every person having an interest in the real estate capable of being damnified by the laying out of the new road., *Sherwood v. City of LaFayette*, and the authorities therein cited, 10 N. E. Rep. 90 and 91; *Anderson v. Pemberton*, 89 Mo. 66. (6) The court erred in overruling the motion to require a rule and attachment upon Willis Taylor to amend his record. The reading was a jurisdictional one, could not be waived by township board or attorneys. To make an entry that the petition was publicly read, when it was not, did not give jurisdiction. (7) It is admitted that J. D. Cooley was not commissioned or appointed by the county court until the —— day of October, 1888. Also admitted that he was appointed by the township board, and had given bond on September 3, the date of the last meeting of the board. Section 8459, Revised Statutes, 1889, provided that any vacancy in the office of justice of the peace, or in the township board, shall be filled by appointment of the county court. A majority vote of the board decides all questions, and his voting might have changed the entire proceedings of the board.

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Whitsett & Jarrott, for the respondents.

(1) The petition is sufficient. "A petition for the location of a public highway need not set out a description of each tract of land with the name of the owner." *Wells v. Rhodes*, 14 West. Rep. 289; 16 N. E. Rep. 830; *Adams v. Harrington*, 12 West. Rep. 299; *McD. v. Payne*, 14 West. Rep. 102. "Where in the petition the description of the highway is such that it can be located readily and with certainty, it is sufficient. *Jackson v. Rankin*, 67 Wis. 285. (2) The petitioners signed the petition. Their attorneys signed the notices. "Notice need not be signed by any one." *Daugherty v. Brown*, 91 Mo. 26. (3) The statute under which the township board appointed the commissioners does not require the commissioners to be sworn before they enter upon their duties. *Sutherland v. Holmes*, 78 Mo. 399; *Schuylkill Falls Road*, 2 Bin. 250; *Road from App's Farm*, 17 S. & R. 388; *Turnpike Co. v. Jarrett*, 4 Ind. 213; *Cage v. Trager*, 60 Miss. 563. (4) Section 8547 does not require the petitioners to set forth in their petition the names of mortgagees. It was unnecessary to name Jarvis-Conklin Mortgage Company in petition. "If damages are assessed to wrong party, the error can be amended after verdict and judgment." *State v. Rulow*, 13 Cent. 268. "The word 'owner' does not include mortgagee." *Parish v. Gilmanton*, 11 N. H. 293. "Mortgagees are not necessary parties." *Whiting v. N. Haven*, 45 Conn. 303; *Cool v. Commet*, 13 Me. 250; *Paine v. Woods*, 108 Mass. 160; *Welch v. Boston*, 126 Mass. 442; *Grand Rapids v. Railroad*, 58 N. Y. 641; *Hook v. Morten*, 10 Hun. 302; *Bridge Co v. Summers*, 13 W. Va. 476. The various notices gave the Jarvis Company timely notice of the proceeding. If this mortgage company is not satisfied, it can sue J. E. Brooks or Mrs. Chandler for the debt, or ask to have the damages subjected to the payment of its debt.

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Woods v. Westborough, 140 Mass. 403; *Bank v. Roberts*, 44 N. Y. 192. (5) The three township boards, the county and circuit courts, have decided that the petition was publicly read. It is too late now for appellants to contradict a point so well established. (6) At the last meeting of the joint session, J. D. Cooley, who had been appointed to fill the unexpired term of W. D. Meyers, acted as one of the members. He had been appointed as trustee; had qualified and given bond. Whether he was legally appointed, or not, he was certainly *de facto* officer of said township board. Even if he had no right to meet with said board, the record shows that every member of said board concurred in every order in relation to the establishment of said road.

Gill, J.—This is a proceeding to open and establish a new road in Cass county on the township lines between Pleasant Hill, Camp Branch and Peculiar townships. Cass county having adopted what is known as "township organization," the proceedings were begun before the township boards in said townships, were thence appealed to the county court of said county, and then by appeal to the circuit court, and from the circuit court to this court by appeal of objectors, Gibson and Chandler. The proceedings were instituted in March, 1888, at which time one Brooks owned a portion of the land sought to be used for the new road, but during the progress of the cause (in May, 1888) Mrs. Chandler, one of the objectors, became possessed of Brook's interest, and she seems to have entered her appearance and continued the contest (her husband joining).

Petitioners were enabled to agree with all others whose lands were affected by the proposed road except these appellants. Commissioners were appointed by the "township boards" (all acting together as the law provides), who in the first place assessed the respective

damages of Mrs. Gibson and Mrs. Chandler at fifty dollars each; and then again, on appeal, the county court appointed a commissioner who fixed the damages of objector Gibson at seventy dollars and objector Chandler at thirty dollars. From this award and judgment said objectors appealed to the circuit court, where the judgment of the county court was affirmed, and said objectors are now in this court by appeal.

I. It would serve no useful purpose to go over, in detail, the *very numerous* objections that industrious counsel have urged against the legality of this proceeding. A large number of the points raised are trivial, unworthy of serious consideration, whilst others can be disposed of in gross by a few general remarks. Among the latter we class the continuous and oft-repeated claim that the petition for the road, the order directing the survey, report of survey, etc., are all worthless, because the route of the road is not as definitely described as should be. We see no possible merit in this contention. It is quite apparent that with these descriptions there could be no trouble in marking out the exact line of the new road.

Again, as to the fault found with the county court, that it refused to command the clerk of the "township board" to have the record speak differently, in that the clerk should have the record say that the petition was *not publicly read*, as the law provides, we deem it only proper to say that the county court found the *fact* to be otherwise.

Again, too, as to whether or not J. D. Cooley was a regular commissioned member of the joint township board, does not concern this case, since it is clear he was so *acting*, and if not a member *de jure* he was *de facto*, and we cannot in this proceeding try the title to such office.

As suggested, that which most concerns the court in review of such proceedings as this is, did the tribunal trying the cause acquire jurisdiction? That

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acquired, mere irregularities in the manner of trial, or in the particular forms of orders, etc., attending such trials, will not serve to set aside the judgments of these inferior tribunals, often presided over by persons unlearned in the law.

II. As claimed by objector's counsel, the notice and petition are matters jurisdictional, and the "township board" had no jurisdiction to act in the matter until such a petition was presented and such notice given as the law directs. It is claimed that this notice was not given, objection being that such notice was not signed by all the petitioners. We do not understand the statute to require the notice to be signed by the petitioners. Section 8547, Revised Statutes, 1889, empowers the township board to lay out and establish a new road "when petitioned for by not less than twelve householders in said township and residing within three miles of the proposed road," etc. Section 8548 provides a copy of this petition with a notice as to when the same will be heard to be posted in three public places in the township not less than twenty days before action thereon shall be taken. And then section 8554 (relating to the establishing roads on township lines) directs petitions and notices *as in other cases*, except that such notices shall be posted in *each* of said townships; and in such cases, too, the boards in all said townships are to meet and act as one body. We do not regard the notice here provided for anywise different from that required in ordinary cases under the general road law (section 6936, Revised Statutes, 1879), except here the notice must be accompanied by a copy of the petition. And it has been decided that such notice (as provided by said section 6936) need not be signed by any one. *Daugherty v. Brown*, 91 Mo. 26.

III. Further objection is made to the effect that commissioners appointed by the joint township board did not take and subscribe an oath for faithful performance of duty, *before* proceeding to assess damages. In

answer to this, it is sufficient to say that the statute controlling such proceedings before the township board does not require such oath, but only demands such commissioners to make their report "under oath," (Revised Statutes, 1889, section 8549), and this was done as the record shows. *Sutherland v. Holmes*, 78 Mo. 401.

IV. The only remaining question of importance involved in this appeal grows out of the following fact: At the institution of this proceeding to establish a public road the Jarvis-Conklin Mortgage Company had a deed of trust on the land of one J. E. Brooks, a party to the proceedings, and it is now urged that said Jarvis-Conklin Company should have been made a party to the proceeding, as an owner whose property was affected. Again referring to the statute, we find (section 8547) that the petition for such new road shall give only the names of the "*owners*" of land, over which the road is to pass;" and in section 8549 damages are to be assessed to the *owners*, etc. No mention is made of incumbrancers or mortgagees. The beneficiary in a deed of trust (such as was the Jarvis-Conklin Company, or even a mortgagee of real estate), is no longer considered the *owner* of such estate. As said by an author of good standing, "as to all persons except the mortgagee and those claiming under him, it is everywhere the established modern doctrine that a mortgagor in possession is, at law, both before and after breach of the conditions, the legal owner." 1 Jones on Mortgage, sec. 11, *et seq.* In *Parish v. Gilmanton*, 11 N. H. 294, it was held that "a mortgagee not in possession is not entitled to be regarded as the *owner* of the land mortgaged, so as to entitle him to notice of the laying out of a contemplated highway over the land mortgaged. That the mortgagor, while in possession, is to be regarded as the owner of the land for such purposes." See, also, Mills on Em. Dom., sec. 74;

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Whiting v. New Haven, 45 Conn. 303; *Platt v. Bright*, 38 N. J. Eq. 81.

The substantial rights of the mortgagee are not disturbed; and when the mortgaged land is converted into money the mortgagee may pursue the money in place of the land, and have it applied to the payment of his debt. Such money becomes, at the election of the mortgagee, a substitute for the land taken, and the mortgagee has a specific lien upon the fund. Jones on Mortg., sec. 708; *Platt v. Bright*, *supra*.

We are of opinion, then, that said Jarvis-Conklin Company, beneficiary in a deed of trust on said Brook's land, did not come under the designation of "*owners*" of the land taken, and was not a necessary party to the proceedings. After a full consideration of this case we detect no error prejudicial to the rights of the objectors, and, therefore, affirm the judgment of the circuit court. All concur.

40	477
41	960
40	477
43	271
40	477
50	36
40	477
58	501
40	477
82	635
40	477
88	354

THE KEYSTONE IMPLEMENT COMPANY, Appellant, v. LEVERITT LEONARD, Respondent.

Kansas City Court of Appeals, April 14, 1890.

1. **Warranty:** CONSISTENT DEFENSES. In an action for the purchase price of a machine, a defense upon a breach of the warranty of the machine and another defense upon the fact that the machine was bought for specific purposes made known at the time to the plaintiff, and that it proved utterly worthless for that purpose, are consistent defenses, and the last named is not to be confounded with an implied warranty.

2. **Defense:** NO RETURN OF WORTHLESS MACHINE. That a machine was of no value for the purpose for which it was purchased is a valid defense as showing a failure of consideration and this whether the defendant offered to return the machine or not, or failed to notify plaintiff of its worthlessness. But where the article bought is of any value for any other purpose, then the vendee cannot retain it and interpose the defense of total failure of consideration.

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3. **Practice:** EVIDENCE: OBJECTION: INSTRUCTION. **Although evidence was introduced upon an erroneous assumption, objection thereto cannot be made for the first time in the appellate court, and it is not error to refuse instructions that are but repetitions of others given.**

4. **Warranty:** RETURN OF ARTICLE: REASONABLE TIME. **A vendee is entitled to a reasonable time in which to test the machine and determine whether it fills the requirements of the warranty, and the retention of it for that purpose during that time could not be *held* an acceptance, and the vendor cannot be heard to complain of delays in returning the article occasioned by himself.**

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

Ramsay & Getman, for the appellant.

(1) Legal propositions relied upon. Where the warranty is in writing, it cannot be enlarged or varied by parol. 1 Parsons on Contracts [6 Ed.] 590. Nor can a warranty be implied. Benj. on Sales [3 Am. Ed.] sec. 666. An express warranty of the quality of the chattel excludes any implied warranty of its fitness for its intended use. *International Co. v. Smith, B. R. & M. Co.*, 17 Mo. App. 264; *Johnson v. Latmer*, 71 Ga. 470. (2) If a buyer upon breach of warranty seek to return the goods it must be done forthwith or without unreasonable delay. 1 Parsons on Contracts, 592, and note; *Johnson v. Whitman*, 20 Mo. App. 100; *Warder v. Fisher*, 48 Wis. 338. There must be no delay if the purchaser exercises this right. Delay in so doing, or any act equivalent to acceptance, employment or disposition of the goods after he knows, or should know their deficiency, if any exists, would be construed either into an admission that there was no deficiency or the waiver of his right to rescind the sale because of such deficiency. 1 Parsons on Contracts

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[6 Ed.] 594; *Cookingham v. Susaa*, 21 Pac. Rep. 95; *Soper v. Breckenridge*, 4 Mo. 17. If a purchaser has not returned the goods within a reasonable time, the measure of damages is the difference between the price paid, or to be paid and the real value. 1 Parsons on Contracts [6 Ed.] 592. Where notice of defects was given to vendor, it was held that buyer, continuing to use the machine, was deprived of right to return it, but not estopped from reducing amount of recovery. *Aultman v. Thiver*, 34 Iowa, 272.

Sam'l Boyd and *F. P. Sebree*, for the respondent.

(1) The brief of the appellant is misleading in the statement of facts. The respondent did not hold this machine from December until March before offering to return it; and furthermore after he offered to return it, he held it at the request of plaintiff. (2) The second defense relied upon by defendant, viz.: That the machine was of no value for the purpose for which it was purchased, was fully sustained by the evidence, and the second instruction of the defendant was properly given. *Compton v. Parsons*, 76 Mo. 455; *Murphy v. Gay*, 37 Mo. 535; *Kerr v. Haymaker*, 20 Mo. App. 350; *Barr v. Baker*, 9 Mo. 850.

SMITH, P. J.—The plaintiff sued defendant for the price of a fodder cutter. The defendant admitted the purchase of the machine, but denies that he owes plaintiff anything on account thereof, and pleaded and offered evidence to sustain two defenses: *First*. That the machine was bought with a warranty that it was the finest machine ever presented to the public, strongly and durably made, would do good work, etc., and that if it did not do good work as warranted the plaintiff on notice would make it work properly; and that it failed to work and was a failure as a cutting machine, and that defendant notified plaintiff, and he failed to make it

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work, and that defendant offered to return the machine and is still ready and willing to return it; and, *second*, that the machine was bought for the purpose of cutting fodder and carrying it into the barn, and that for that purpose the machine was of no value, and that defendant after ascertaining that fact offered to return it to the plaintiff. There seems not to have been filed a replication to the defendant's answer, or if so we can find no trace of it either in the plaintiff's abstract or in the suppletive one of defendant. However this may be, the evidence tended to show the contract of warranty and the breaches thereof substantially as alleged in the answer.

It appears therefrom that the machine was delivered to the defendant about the seventeenth of November, 1887, at his farm, where it was set up and run between that day and the month of March following, some twenty-five days in all. It seems to have been bad in make and material and did not do its work properly. It was constantly breaking and out of order. It required twenty-five days to do the work which it should have done in half that time. It was, as a cutting machine without value. After the defendant had subjected it to a fair trial and found that it did not meet the requirements of the warranty, notice was given to the agent of the plaintiff of that fact, accompanied with an offer to return it to plaintiff. That, after the defendant ascertained that it was worthless and had offered to return it, he continued to occasionally run it up to March, 1888. The reason why he continued to use the machine was that the plaintiff's agent urged him to do so, stating that it would work if defendant "would not get blue." There was some other evidence which need not be stated as it is not important or necessary to the proper consideration of the questions which will be presently noticed. The verdict of the jury under the instructions, which need not be set forth,

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was for the defendant, and after an unsuccessful motion to set the same aside, judgment was rendered thereupon to reverse which this appeal is prosecuted.

I. The plaintiff contends that the case was tried upon the theory that there were two warranties instead of one, or in other words that there was an express and implied warranty. This is a misconception of the theory upon which the court proceeded in the trial.

The answer, the instructions and evidence all show that the case went to the jury upon the idea that there were two separate and distinct defenses interposed by the defendant, one based upon the warranty and the other upon the fact that the machine was bought for a specific purpose made known at the time to the plaintiff, and that it proved utterly worthless for that purpose. These were consistent defenses.

The plaintiff seems to confound the last-named defense with that of an implied warranty, when no such defense was interposed. The defense that the machine was of no value for the purpose for which it was purchased was well sustained by the evidence, The defendant's second instruction accorded with this theory. Such a defense was valid as showing a failure of consideration, and this whether the defendant offered to return the machine or not, or failed to notify plaintiff of its worthlessness. *Barr v. Baker*, 9 Mo. 850; *Murphy v. Gay*, 37 Mo. 535; *Compton v. Parsons*, 76 Mo. 535; *Keen v. Haymaker*, 20 Mo. App. 350.

This rule is subject, however, to the qualification that if the article bought and sold is of any value for any other purpose, then the vendee cannot retain it and be permitted in an action for the purchase price by the vendor to interpose the defense of a total failure of consideration. In such case he must either return, or offer to return, the article to the vendor within a reasonable time after he discovers the worthlessness of the same for the purpose for which it was bought and sold.

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Brown v. Weldon, 99 Mo. 564. Whether the machine in the present case was of some value for any other purpose than that which it was purchased the evidence does not very clearly show, but if it was then his instruction was not erroneous, because it directed the jury, that, before it could find for the defendant, it must believe from the evidence that he offered to return the machine. Besides this if the evidence was introduced upon the erroneous assumption that one of the defenses was that of an implied warranty, there was no objection made to such evidence in any form and that objection is not available now, being made here for the first time. But such objection in view of the answer would have been without force, no difference when made. The plaintiff further complains that the trial court erred in refusing to give two of the instructions asked by it. It is a sufficient answer to this to say that they were but repetitions of a like number which were given for plaintiff.

II. The plaintiff further contends that the defendant did not offer to return said machine within a reasonable time after he discovered that it did not fulfill the terms of warranty. The defendant was entitled to a reasonable time in which to test the machine and determine whether it filled the requirement of the warranty, and the retention of it for that purpose during that time could not be held an acceptance. *Phil. Whiting Co. v. Leadworks*, 24 Nev. 881; *Osborn & Co. v. McQueen*, 29 Nev. 636; *Skeen v. Springfield E. & T. Co.*, 34 Mo. App. 485. The uncontradicted evidence was that the defendant at the urgent request of the plaintiff continued the use of the machine during the entire time occupied by him in cutting his corn. We are satisfied from an examination of the evidence that the delay of the defendant in not promptly returning the machine was occasioned by the request of the plaintiff, which furnishes a complete excuse ard justification

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therefor. Surely the plaintiff cannot be heard to complain of delays that he occasioned. The ordinary presumption arising from the use of the machine was met and overcome in this case by the attending circumstances of that use as shown in the evidence.

But, as has already been remarked, the question of a reasonable time, either as one of law or of fact in respect to the return of said machine by defendant, is not properly before us, or if it is then the plaintiff's second instruction taken in connection with those given for defendant sufficiently enlightened the mind of the jury in relation to it so that there is really no grounds for complaint on that account. The case was in the main fairly tried, and we can discover no grounds justifying our interference with the judgment which must be affirmed. All concur.

B. WERNER, Plaintiff in Error, v. JAMES O'BRIEN, Defendant in Error.

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Kansas City Court of Appeals, April 14, 1890.

1. **Warranty:** REMEDY OF PURCHASER: INSTRUCTIONS. On a breach of warranty, the purchaser has two remedies, to-wit: He can seasonably return the warranted article and rescind the contract; or he can retain the article and when sued for the purchase money plead a total or partial failure of consideration. The action of the court in giving and refusing instructions in this case approved with exception of some harmless error.

2. **Evidence:** WARRANTY: EXPERT WITNESS: LAPSE OF TIME. Where expert witnesses testify that tobacco of good quality did not deteriorate by age but generally grew better, it is not error to permit them to testify as to the condition of said tobacco on an examination made more than a year after the sale in question.

3. **Instructions:** ASSUMPTION OF FACT. The court's instruction in this case *held* not to contain the vice of assuming a material fact in the issue.

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4. **Pleading**: EVIDENCE: ESTOPPEL: INSTRUCTION. On an examination of the pleading and evidence it is *held* that neither plaintiff's replication nor his evidence was sufficient to support an instruction embodying an estoppel.

5. **Warranty**: DAMAGES: INSTRUCTION: HARMLESS ERROR. While in this case the court's instruction did not, as it should have done, limit defendant's damages, still, as the finding of the jury was not beyond the amount of the note sued upon, the error was harmless to the plaintiff.

Error to the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

H. T. Williams, for the plaintiff in error.

(1) The court erred in refusing plaintiff's instructions 1, 2, 3 and 5. The defendant kept the goods after examining and testing them; used a large part of them in his business. Paid three of the four notes, the last one nearly eight months after the sale, made no claim on account of defective quality, but on the contrary, when the note sued on came due, negotiated for an extension of time thereon. The defendant, therefore, having received and accepted the benefits of the contract, cannot escape its obligations. *McCreary v. Parsons*, 2 Pac. Rep. 370; 31 Kan. 447; 2 Herman on Estoppel and Res Adjudicata, secs. 1039, 1043, 1053, 1063; 3 Randolph on Commercial Paper, sec. 1870; *Delaney v. McDonald*, 1 N. W. Rep. 331; 47 Wis. 108; *Abbot v. Johnson*, 2 N. W. Rep. 332; 47 Wis. 239. (2) Any proof of the condition of the tobacco in defendant's possession nearly one year and a half after the sale was inadmissible. 1 Benj. on Sales [4 Am. Ed. by Corbin] sec. 991; 2 Benj. on Sales, sec. 945, note 15; *Graff v. Foster*, 67 Mo. 520; 1 Greenl. Ev., sec. 49. (3) The court's instruction was prejudicial to the plaintiff and strongly calculated to mislead the jury.

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Note the language, especially the latter half of the instruction. It assumes that the defendant has sustained damage, which assumption is error because there is much evidence to the contrary; and the court cannot directly or by implication assume in the instructions a material fact that is in issue. 2 Thompson on Trials, sec. 2295; *Moffat v. Conklin*, 35 Mo. 453; *Merrit v. Given*, 34 Mo. 98; *Thompson v. Botts*, 8 Mo. 710; *Peck v. Ritchey*, 66 Mo. 114. (4) The court's instruction ignored the matters placed in issue by plaintiff's reply to defendant's amended answer, *i. e.*, that defendant was estopped to set up want of consideration. *Raysdon v. Trumbo*, 52 Mo. 35; *Cohn v. Reid*, 18 Mo. App. 115; *Jackson v. Bowles*, 67 Mo. 609; *Crews v. Lockland*, 67 Mo. 619; *Greer v. Parker*, 85 Mo. 107; *Sigerson v. Pomroy*, 13 Mo. 620. (5) The jury were privileged by the court's instruction to find for the defendant any amount of damage however excessive, and were not limited to the amount asked in defendant's amended answer. This was error prejudicial to the plaintiff. *Crews v. Lockland*, 67 Mo. 619 at p. 622; *Wright v. Jacobs*, 61 Mo. 19.

George F. Longan, for the defendant in error.

(1) The court properly refused plaintiff's instructions 1, 2, 3 and 5. The fact that defendant paid a part of the notes given for the tobacco in question, and kept the tobacco and made no offer to return it, will not preclude him from setting up as a defense a failure or partial failure of consideration. *Compton v. Parsons*, 76 Mo. 445; *Branson v. Turner*, 77 Mo. 489; *Voss v. McGuire*, 18 Mo. App. 477; *Courtney v. Boswell*, 65 Mo. 196; *Murphy v. Gay*, 37 Mo. 535; *Kerr v. Haymaker*, 20 Mo. App. 350. (2) The record shows that no evidence as to condition of tobacco one year and a half after the purchase was admitted until defendant had testified as to the manner in which said tobacco

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was kept during the time, and expert testimony was introduced shewing that tobacco kept as this had been kept could not deteriorate or in any way be injured or damaged, but on the contrary would improve, and that its condition at time of examination was in effect its condition at date of purchase. (3) The instruction given by the court does not assume that defendant had sustained damages. It is purely hypothetical, based on the evidence in the case, and does not assume the existence of any fact. (4) There is nothing in fourth point in plaintiff's brief for the reason that the pleadings do not state nor the evidence show facts which would constitute an estoppel. Authorities cited under 1. (5) The defendant in his amended answer asked judgment against plaintiff for one hundred and ninety dollars, but the verdict of the jury gave him nothing and if there was any point in the fact that the court, in its instruction, failed to limit the amount the jury could find for defendant it was cured by the verdict, and if the verdict had given defendant a greater amount than he asked, the defect could have been cured by a *remittitur*. *Ensworth v. Barton*, 67 Mo. 622.

Smith, P. J.—Plaintiff brought suit against the defendant in the circuit court of Pettis county on a promissory note for one hundred and sixty-five dollars. The defendant in his answer admitted the execution of the note and alleged that it was the last one of a series given plaintiff for the purchase price of leaf tobacco which the plaintiff warranted to be of such quality and in such condition as to be fit and suitable to be used by defendant for wrappers of fine cigars, and that said tobacco proved wholly unfit and unsuitable for that purpose, etc. There was a further allegation that the tobacco was purchased by sample, and that it was warranted to be equal to the sample by which the purchase was made; that it was inferior to such sample in quality and grade and would not burn, and could not

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be used in the manufacture of fine cigars on account of being inferior in quality and condition to the sample, etc. The plaintiff replied admitting the warranty and alleged a compliance therewith in respect to the tobacco delivered. It was further alleged that defendant had waived his rights under said warranty in that he had paid at the maturity thereof the first, second and third of the notes given plaintiff for the purchase of said tobacco; and on the third he had asked and obtained an extension of the time thereon; that at no time had defendant offered to rescind said sale, or made any claims on account of the defective quality of the tobacco, etc.

At the trial the defendant introduced evidence tending to sustain the allegations of his answer. The evidence of the plaintiff tended to prove the facts which he had affirmatively alleged in his replication. The plaintiff asked a number of instructions which were by the court refused. The first told the jury that if the note sued on was one of a series given at one time as one transaction in settlement for a lot of tobacco, and defendant paid said notes as they became due after having a reasonable time and opportunity to test the tobacco, defendant could not then question the consideration of the note sued on. The second declared that if the defendant wrote a letter to plaintiff asking for an extension of the time of the payment of the third note when it became due, and promising therein to pay said note at the end of such time, then defendant should be deemed to have waived the right to set up the defense of a failure of consideration of said note. The third was in effect the same as the second. The fourth declared that if the sale of said tobacco was by sample, and that which was delivered to defendant was equal to the sample, the plaintiff should recover. The fifth declared that if the defendant retained the tobacco in his possession and used a part thereof in the business

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of manufacturing cigars, and made no claim for reduction in the price as settled for by the notes, but continued paying them many months after the sale without offering to return the tobacco, that fact raised the presumption that the defendant's claim of defective quality was not well founded. The court on its motion gave the following instructions: "The court instructs the jury that if they believe from the evidence that the note sued on in this case was given by the defendant as a part of the purchase price of a lot of tobacco sold by plaintiff to defendant, and further believe from the evidence that plaintiff as a part of the contract of sale warranted said tobacco to be of such quality as to be suitable for wrappers in the manufacture of fine cigars, and that the said tobacco would burn, and that, at the time of such sale, plaintiff exhibited to defendant a sample of tobacco and contracted with the defendant that the tobacco sold should be as good as the sample shown to him by plaintiff, and that the tobacco sold and delivered to defendant was not suitable to be used in the manufacture of fine cigars, and was not as good as sample shown to him by plaintiff, and that defendant is damaged by reason thereof, then the jury should deduct the amount of said damage from the amount due on said note and render a verdict for plaintiff on the balance, providing you find from the evidence that such damage is less than the amount due on the note. And if you find from the evidence that the amount due on the note is less than the amount of such damage then you should deduct the amount due on the note from the amount of such damage and return a verdict for defendant for the balance so found. But if the jury believe from the evidence that the tobacco sold was as good as the sample and was what it was represented and warranted to be by plaintiff, and that defendant has sustained no damage, then you should find for the plaintiff for balance due on the note."

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The finding of the jury was for defendant, upon which judgment was rendered accordingly, to reverse which the plaintiff brings this case here by writ of error.

I. The plaintiff's contention is that the several instructions asked by him should have been given as the law of the case. We cannot regard this contention favorably because the defendant interposed the defense that there was a warranty of the quality and condition of the tobacco, which defense stood admitted by the replication. In such case if the tobacco was not as warranted defendant had two remedies: He could have returned the tobacco to the plaintiff provided he acted seasonably and rescinded the contract; or he could have retained the tobacco and when sued for the purchase money pleaded a total or partial failure of consideration. The evidence tended to show that the tobacco was purchased for wrappers for fine cigars, and that the plaintiff warranted it to be fit to work for that purpose and that it would burn all right; that defendant tested the samples thoroughly and they burned all right, but it was found that the tobacco delivered, after a thorough test, would not burn when used in the cigars which were manufactured by defendant; that the defendant was told when he made the complaint to plaintiff's traveling agent and salesman about the inferior quality of the tobacco that it would be all right when he got down into it; that it was purchased at forty-nine cents per pound, and was not worth more than twenty-two cents.

It has been long and well settled that the right of a vendee to maintain, as a defense in an action of this kind, the defective quality of the warranted article in diminution of the price was not lost by the vendee receiving and accepting the article. *Branson v. Turner*, 77 Mo. 494; *Compton v. Parsons*, 76 Mo. 455; *Murphy v. Gay*, 37 Mo. 535; *Voss v. McGuire*, 18 Mo. App. 477; Benjamin on Sales, secs. 1351-2.

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Tested by this rule it is quite clear that the plaintiff's instructions, except the fourth, were erroneous in theory as applicable to this case. The plaintiff's fourth instruction was proper, and, had not the court on its own motion given an instruction presenting for the consideration of the jury a like theory, its action in refusing that instruction would have been error. The first instruction given by the court on its own motion fairly presented the whole case to the jury. There was neither occasion or necessity for other instructions to the jury.

II. No error is perceived in the action of the trial court in permitting the witnesses, Honkomp and Behrens, who had examined the tobacco more than a year after the sale thereof to defendant, to testify as to its quality and condition at that time, since they testified as experts that if the tobacco was of good quality when purchased it would still be so, as it did not deteriorate by age, but generally grew better. The tendency of such evidence was to show, though perhaps but slightly, that the quality of the tobacco at the date of purchase was the same as that at the date of examination.

III. The trial court did not by its instruction directly or by implication assume a material fact in issue. The instruction given by the court contains no such vice as the plaintiff seems to suppose. When the whole instruction is read and considered it will be seen that plaintiff's objection arises from a misconception of the purport and meaning.

IV. There was no plea of estoppel in the replication, or if so there was no evidence upon which to base an instruction embodying that theory. The plaintiff admitted the warranty but alleged a compliance with its requirements on his part and a waiver thereof by defendant. Upon the first of these defenses the court instructed the jury, and as to the latter it did not, there being no evidence to support the same

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V. While the court's instruction did not, as it should have done, limit the jury in its finding of damages for defendant, still as the finding for defendant was not beyond the amount of the note sued on, we are unable to discover that the plaintiff suffered any injury in consequence thereof. The error was harmless to the plaintiff. The judgment seems to have been for the right party, and it will therefore be affirmed. All concur.

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In re JOHN R. GREEN, Clerk of the Circuit Court of Ray County, Petitioner.

Kansas City Court of Appeals, April 14, 1890.

1. **Costs:** STATUTORY ONLY: CONSTRUCTION. Costs can only be recovered where expressly authorized by statute; and all statutes relating to costs must be strictly construed.

2. **Penalty:** CIVIL ACTION: COSTS. An action against a railroad company to recover the penalty prescribed by section 806, Revised Statutes, 1879, is a civil action and in its nature *qui tam;* and costs should be taxed according to the statute relating to costs in civil and not in criminal, cases.

3. ——: ACTION FOR, HOW BROUGHT: TAXATION OF COSTS. The action for such penalty under said section should be brought in the name of the state at the relation of the prosecuting attorney, on the information of the informer, and against the railroad company; and, in case the action is unavailing, the informer, who is the real actor and the party beneficially interested in the suit, should pay the costs.

Petition for Mandamus.

WRIT DENIED.

Thos. N. Lavelock, Prosecuting Attorney, for the county.

James E. Ball, for the relator.

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Per Curiam.—This is a proceeding commenced here by *mandamus* to compel the judge of the circuit court and prosecuting attorney of Ray county to certify a certain bill of costs for payment under section 2108, Revised Statutes, which accrued in a certain civil action begun by said prosecuting attorney in the name of the state to the use of Ray county, on the information of a resident and citizen of said county, against the Wabash Western Railway Company, under section 806, Revised Statutes, and in which said action the said railway company had judgment. The single question presented for our decision is whether the county of Ray is liable for the costs adjudged in favor of said railway in the action referred to.

This question must be determined by the light of the statute. It must be remembered that costs can only be recovered where expressly authorized by statute. And, further, that all statutes relating to costs must be strictly construed. *Shea v. Railroad*, 67 Mo. 687; *In re Murphy & Spillane*, 22 Mo. App. 476.

This was a civil action, though of a criminal nature (*State v. Railroad*, 30 Mo. App. 494), for a penalty brought in the name of the state to the use of Ray county, upon the information of a private citizen, and was in its nature *qui tam*.

If there had been a recovery against the railroad company of the penalty sued for, one-half thereof would have been adjudged to the county and one-half to the informer. This was not a procedure, either by indictment or criminal information, and the provisions of chapter 25, Revised Statutes, relating to costs in criminal cases, have not the slightest application to the case. If the county is liable at all, it must be under the provisions of chapter 22, Revised Statutes, which relates to costs in civil cases. Section 1005 of said chapter provides that, when any suit or proceeding instituted in the name of the state or any county, on

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the relation or in behalf or for the use of any private person, the person for whose use the suit is brought shall be held liable for the payment of all costs.

We think the suit in which said bill of costs accrued should have been brought in the name of the state at the relation of the prosecuting attorney of Ray county, on the information of George McMullen, informer, against said railway, instead of the manner in which it seems to have been brought. If it had been instituted, as undoubtedly it should have been, then no question as to the non-liability of the county for the payment of the costs therein could have arisen under the statute, which, in express terms, provides that, where a suit is brought in the name of the state on the relation or in behalf or for the use of a private person, the person for whose use the action is brought shall be held liable for the payment thereof. In looking at the statute, section 806, and the information in case in which the said bill of costs accrued, and it becomes quite plain that the informer, who was entitled to one-half of the penalty sued for, was the real actor in the case. He was the "power behind the throne," through whose agency, primarily, the machinery of the law was set in motion for the purpose of recovering the penalty. He was the party beneficially interested in the suit, and should pay the costs for his false information, if such be made. These suits are oftentimes brought for speculative or vexatious purposes, and they should not be prosecuted at the risk or expense of the public. The prosecuting attorney need not bring them until proper security for costs is given, but whether it is given or not the statute is not broad enough in its terms to authorize us to hold the county, though erroneously made a party in said case, liable for the payment of the costs therein. The peremptory writ of *mandamus* must be denied. All concur.

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THE LAFAYETTE COUNTY BANK AND JOSEPH WILSON, Cashier and Trustee, Respondents, v. METCALF, MOORE & Co., Appellants.

Kansas City Court of Appeals, April 14, 1890.

1. **Conversion:** AGENT: ACT OF HOSTILITY TO TRUE OWNER. One who finds himself in possession of property belonging to another, yet does nothing with the property or to the property in hostility to the true owner is not guilty of conversion; if an agent, however, does that (in this case sells fatted beef cattle, in the usual course, for slaughter and consumption) which cuts off the true owner's remedy to follow his property and hold him liable in whose hands he may discover it, he should be held in conversion, notwithstanding his ignorance of the true owner's claim.

2. ——— : ——— : MORTGAGE: RECORD NOTICE. If a mortgagor rightfully in possession of mortgaged cattle delivers the same to his commission merchant, who without actual notice of the mortgage sells and accounts to him for the proceeds, the merchant will be liable to the mortgagee for conversion, as the record of the mortgage gave notice to all dealing with the cattle whether within or without the state, and took the place of a change of possession and the case stands as if the cattle had been taken from the mortgagee's possession by the mortgagor.

3. **Mortgage:** SALE BEFORE DEFAULT. A mortgagor in possession may, generally before condition broken, sell and deliver the mortgaged property, but such sale must be in recognition of, and not in antagonism to, the mortgage; and, if the sale is such as purports to convey complete title, the mortgagee has immediate right to the possession; and, if the mortgagor's vendee destroys the property or materially alters its condition, it is a conversion, and the mortgagee has his action.

4. ——— : DEMAND. The office of a demand is evidential and not creative. A wrongful sale constitutes an actual conversion and when shown dispenses with a demand.

5. **Ratification:** INSTRUCTION. An instruction telling the jury that in order to find a ratification they must believe plaintiffs knew of the sale and that the money paid them arose from said sale, is approved under the facts in this case.

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Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

AFFIRMED.

Taylor & Pollard, O. L. Houts, for the appellants.

(1) *First.* The petition and the evidence fail to state facts sufficient to constitute a cause of action in this: It shows that these defendants were mere factors, having no knowledge of plaintiff's interest in said cattle, and showing no negligence in not having such knowledge, hence they had a right to pay the proceeds of the cattle to their consignors. Meacham on Agency, sec. 1050; *Lenthold v. Fairchild*, 28 N. W. Rep. 218; *Burnett v. Gustafson*, 54 Iowa, 86; *Roach v. Turk*, 9 Heisk. (Tenn.) 708; *Barnard v. Kobbe*, 54 N. Y. 520; Story on Agency [9 Ed.] sec. 217; *Spooner v. Holmes*, 102 Mass. 503; *Rogers v. Huie*, 2 Cal. 571; *Mires v. Solebay*, 2 Mod. 242; *Fowler v. Hollins*, 7 Q. B. 616. *Second.* They show that the plaintiffs at the date of sale of the eighty-three head of cattle by appellants had neither the right of possession nor the ownership of said cattle. *Barnet v. Timberlake*, 57 Mo. 501; *Sheble v. Curdt*, 56 Mo. 437; *Stonebraker v. Ford*, 81 Mo. 532; *Caldwell v. Pray*, 41 Mich. 307; s. c., 32 N. W. Rep. 54; *Beach v. Derby*, 19 Ill. 617; *Spalding v. Mozier*, 57 Ill. 148; *Sherman v. Clark*, 24 Minn. 37; *Davis v. Bruce*, 1 Mont. 463; *Porter v. Parmley*, 43 How. Pr. 445; *Hathaway v. Brayman*, 42 N. Y. 322; *Hammill v. Gillespie*, 48 N. Y. 556; *Skiff v. Solace*, 23 Vt. 279; *Cole v. Clark*, 3 Cush. 399; *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 384; *McCandless v. Moore*, 50 Mo. 511; Cooley on Torts, p. 450; *Wilson v. Rountree*, 72 Ill. 470; *Olds v. Andrews*, 66 Ind. 147; Jones on Chattel Mortgages [3 Ed.] secs. 374, 454, 455, 464, 489, 491; *Barbour v. White*, 37 Ill. 164. *Third.* The petition fails

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to show that there was a demand made on defendants for these cattle or their proceeds, and the proof shows there was none; hence they are not liable. *Dusky v. Rudder*, 80 Mo. 400; *Nanson v. Jacob*, 93 Mo. 331; *Wood v. Cohen*, 6 Ind. 455; *Sherry v. Ricken*, 10 Ind. 375; *Myers v. Hale*, 17 Mo. App. 209; 1 Chitty on Pleadings, 183; *Ware v. First Cong., etc.*, 125 Mass. 585; *Loring v. Mulcahey*, 3 Allen, 575; *Spooner v. Holmes*, 102 Mass. 503; *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 384, and cases therein cited; *Weil v. Tyler*, 38 Mo. 545; *State v. Mooney*, 65 Mo. 494. (2) If the plaintiff bank, through its officers or agents, was possessed of facts sufficient from which it could be reasonably inferred that it knew whence came the nine hundred dollars paid on the Winn note, then the receipt of such nine hundred dollars was a ratification of the sale by defendants. *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 384; Jones on Chattel Mortgages [3 Ed.] sec. 457; *Pratt v. Maynard*, 116 Mass. 388.

Graves & Aull, for the respondents.

(1) The first point made by appellants in this court, is that the petition does not state facts sufficient to constitute a cause of action because Metcalf, Moore & Co. had no actual knowledge of the mortgage. Metcalf, Moore & Co., as the agents of the Winns were affected in law with the same knowledge of the mortgage that the Winns had, and by every well-considered case it has been so held, and this, too, notwithstanding appellants' place of business was in East St. Louis. This mortgage being duly recorded in LaFayette county was notice to every purchaser, resident or non-resident. How much more so to Metcalf, Moore & Co., the agents of Winns. Directly in point are the following cases: *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 384; *Feurt v. Powell*, 62 Mo. 526; *Spraight v. Hawley*, 39 N. Y. 441; *Kenon v. Stinson*, 20 N. W. Rep. 364; *Koch v. Branch*,

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44 Mo. 543; *Rice v. Cobb*, 9 Cush. 303; *Laing v. Perrott*, 48 Mich. 198; *Marks v. Robinson*, 2 South Rep. 292; *Hamilton v. Caruthers*, 19 Mo. App. 567; *Martin v. Benoist*, 20 Mo. App. 270; *McCandless v. Moore*, 50 Mo. 572; *Bailey v. Godfrey*, 54 Ill. 508; *Judson v. Cook*, 11 Barb. 642; *Mendenhall v. Rainor*, 2 Hilton, 319; *Fox v. Jackson*, 8 Barb. 355; Story on Agency [8 Ed.] sec. 312, and cases cited; Jones on Chattel Mortgage, sec. 455; *Welch v. Whittemore*, 25 Me. 86; *Allen v. McMonagle*, 77 Mo. 481; *Crocker v. Atwood*, 12 N. E. Rep. 421. (2) Under the sub-head of appellants' first point, it is claimed that the "plaintiffs at the date of the sale of the cattle had neither the right of possession nor the ownership of said cattle." The cases cited by appellants are irrelevant, except *Skiff v. Solace*, 23 Vt. 279, which is expressly overruled in the case of *Jones v. Taylor*, 30 Vt. 42. The following cases cited by respondents under this sub-head are conclusive and controlling: *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 384; *Drug Co. v. Robinson*, 81 Mo. 18; *Laing v. Perrott*, 48 Mich. 298; *Daggett v. McClintock*, 56 Mich. 55; *Grove v. Wise*, 39 Mich. 163; *Bailey v. Godfrey*, 54 Ill. 508; *Allen v. McMonagle*, 77 Mo. 481; *Crocker v. Atwood*, 12 N. E. Rep. 421. (3) Under this sub-head the appellants claim exemption from liability because, notwithstanding they acted as agents for the Winns in making this tortious sale, there was no demand made on them for the proceeds of the sale. None was needed. The appellants stand in the shoes of the Winns, who were their principals. This claim is wholly groundless as will be seen by the following point blank authorities: *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 384; *Drug Co. v. Robinson*, 81 Mo. 18; *Jones v. Taylor*, 30 Vt. 42; *Hake v. Buell*, 50 Mich. 91; *Howitt v. Estelle*, 92 Ill. 220; *Welch v. Whittemore*, 25 Me. 86; *Bailey v. Godfrey*, 54 Ill. 508; *Laing v. Perrott*, 48 Mich. 298; *Daggett v. McClintock*, 56 Mich. 52–55. (4) The court

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instructed fully and correctly concerning ratification by the bank. Knowledge of an act must exist before ratification can be inferred. *Bank v. Metcalf, Moore & Co.*, 29 Mo. App. 396; *Windsor v. Bank*, 18 Mo. App. 665; *Baldwin v. Burrows*, 47 N. Y. 211; *Moore's Ex'r v. Patterson*, 28 Pa. St. 505; *Nixon v. Palmer*, 8 N. Y. 398; *Armory v. Hamilton*, 17 Mass.

Ellison, J.—This case is before us on second appeal. It will be found reported in 29 Mo. App. 384.

Plaintiff is the mortgagee of a certain lot of beef cattle which were being fattened at the mortgagors' farm at the date of the mortgage. Defendants are live-stock commission men, doing business at the National stock yards in East St. Louis, Illinois. The mortgagors shipped the cattle to defendants from LaFayette county, Missouri, who sold and delivered them at the stock yards to purchasers on the market, receiving a commission for the sale. The shipment and sale was without the knowledge or consent of plaintiffs. Plaintiffs did not learn of the sale for several months after it took place. No demand was made of defendants for the cattle. The mortgage was duly recorded in LaFayette county, Missouri, and contained the following provision: "The property hereby sold and conveyed to remain in our possession until default be made in the payment of the said debt and interest, or some part thereof; but in case of sale or disposal, or attempt to sell or dispose of said property, or a removal of, or attempt to remove the same from the farm where it now is without the written consent of Joseph Wilson indorsed thereon, or an unreasonable depreciation in value thereof, the said Joseph Wilson, cashier and trustee, or his legal representatives, may take the said property, or any part thereof, into his possession." Judgment was for plaintiffs and defendants appealed.

Defendants contend, first, that they are not liable to the action of trover and conversion, for the reason

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that they were merely the agents—commission men—of the mortgagors in selling the property for them and turned back to them the proceeds of the sale, less commissions and expenses, and had no notice or knowledge of plaintiffs' interests and were guilty of no negligence. As to this, we have to say, that one who finds himself in possession of property belonging to another, yet does nothing with the property or to the property in hostility to the true owner, is not guilty of a conversion. "A mere bailee is guilty of no conversion though he receives property from one not rightfully entitled to possession, and, acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner." *Nanson v. Jacob*, 93 Mo. 331. But any wrongful act which negatives or is inconsistent with the plaintiffs' right is, *per se*, a conversion. *Dusky v. Rudder*, 80 Mo. 400.

Whether an agent, without notice, who sells and delivers property, which has not been stolen, but has otherwise been wrongfully had of the true owner, can be held liable in an action of trover and conversion, presents a question about which there has been considerable discussion. That he can be so held is ably maintained. *Spraight v. Hawley*, 39 N. Y. 441; *Cole v. Clark*, 3 Cush. 399; *Fowler v. Hollins*, 7 Q. B. (35 Victoria) 616. The latter case is by a divided court, but contains an exhaustive discussion of the subject. It has been cited as deciding there was no conversion by the broker who bought and sold the property. In this respect it is misconceived. The court of queen's bench held there was a conversion, which judgment was affirmed on appeal, probably by an equal division, by the court of exchequer chamber. The contrary to these authorities is strongly maintained in other jurisdictions. *Frizzel v. Rundel* (Sup. Ct. not yet reported); *Roach v. Turk*, 9 Heisk. 708; *Rogers v. Huie*, 2 Cal. 571. In the view we take of this case it is

not necessary to pass upon the conflict which is presented in the books. My individual view of the matter is with the cases first cited.

But all the authorities holding the agent not liable, to which my attention has been called, state the true owner's remedy to be his right to follow the property and hold him liable in whose hands he may discover it. So I take it that, if the agent has done that which cuts off all chance for the owner to assert this remedy, he should be held in conversion. If A., as the agent of B., sells and delivers my bushel of coal to one whom he knows is to immediately consume it for fuel, he has destroyed my property—has converted it, under all the definitions of conversion and is liable to me, though he acted without knowledge of my title. Now, in this case, the property was fattened beef cattle. It was shipped to the market and was sold by defendants, as they say, in the usual course, that is, the cattle were sold for slaughter and consumption. The defendants necessarily knew these things and with this knowledge they cut off all chance of plaintiff to follow the cattle; they destroyed the property. I have no doubt this amounted to a conversion notwithstanding defendants may have been ignorant of the mortgage or the plaintiffs' interest. It was a recognition of this principle which caused KELLY, C. B., in his dissenting opinion in the case of *Fowler v. Hollins*, *supra*, to say that: "The case of goods sent abroad, where they cannot be traced and followed by the owner into the hands of the purchaser, rests altogether upon an exceptional principle, which I think inapplicable to the present case." It is quite clear on all principles of right and justice that if one destroys my property, or does that to it which inevitably works its destruction, he does me a wrong, however unintentional it may be, for which he must answer. For he has not only intermeddled with my property, but he has made it impossible for me ever to recover it.

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But in addition to this: Conceding the cattle to have been in the rightful possession of the mortgagors that fact cannot avail defendants. The mortgage was duly recorded in LaFayette county, Missouri, and thereby became notice to all dealing with the cattle, whether within or without the state. *Feurt v. Powell*, 62 Mo. 524. Recording the mortgage took the place of a change of possession, and the case stands as if the cattle had been taken from plaintiffs' possession by the mortgagors.

II. The second point, which attacks plaintiffs' right, under the terms of the mortgage, we think not well taken. The contention, as we understand it is, that as the debt was not due condition was not broken and the mortgagors were rightfully in possession and had a right to sell; that the provision in the safety clause against sale or removal of the cattle gave to plaintiffs as mortgagees a right to elect to take possession if they were sold or removed; and that until they did so elect no right accrued to them before demand and refusal.

It will not be disputed that a mortgagor in possession may, generally, before condition broken, sell and deliver the mortgaged property, the purchaser holding subject to the mortgage. So the mortgagor's title before condition broken is generally subject to sale on execution. We may concede for present purposes, that though there may be a provision in a mortgage giving the mortgagee the right to take possession of the property if the mortgagor should sell or remove it, and this is a right which the mortgagee may, or may not, exercise, at his option, and until exercised it does not prevent a valid *sale subject to the mortgage.* But it should be borne in mind that the sale must be in recognition of, and *not in antagonism to*, the mortgage. If the sale is such as purports to convey complete title in disregard of the mortgage it is contrary to the agreement (expressed or implied) for the mortgagor to remain in

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possession; and the mortgagee has immediate right to the possession. So, if the mortgagor's vendee destroys the property or materially alters its condition, it is a conversion of it and the mortgagee has his action. In *Ripley v. Dolbier*, 18 Maine, 385, the property was a stallion good for work and breeding and the mortgagor's bailee castrated him. It was held to be a conversion giving an immediate right of action to the mortgagee against the bailee. In the case at bar, as we have seen, the sale was made, not in recognition of the mortgage but in disregard of the mortgagee's rights, and it *annihilated* the security.

III. This brings us to the consideration of the contention that a demand was necessary to plaintiffs' case. I think the contention discloses a misconception of the office of a demand. A demand is not necessary when there has been a conversion without it. Demand and refusal will show conversion when it did not otherwise appear. The office of demand is evidential and not creative. So it is held that a wrongful sale constitutes an actual conversion and when shown dispenses with a demand. *Howitt v. Estelle*, 92 Ill. 218; *Hake v. Buel*, 50 Mich. 89. Conceding, for present purposes, that defendant came lawfully into possession of the cattle yet they have since coming into that possession, as I have shown, committed the tortious act by the disposal of the property. "A conversion may be proved in three ways: *First.* By a tortious taking. *Second. By any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the rights of the owners. Third.* By a refusal to give up possession to the owner on demand." *Nanson v. Jacob*, 93 Mo. 331. "Where the defendant's possession was rightfully acquired, his subsequent possession continues to be rightful *until he shall have done some act inconsistent with the owner's rights.*" Wells on Replevin, sec. 346.

Again, why do a useless thing? Plaintiffs did not discover the loss of the cattle for nearly a year after

they were sold. They had then doubtless been transformed into food and scattered in the markets of the world, or consumed. Of what avail would have been a demand? If the mortgagor of a steer or hog sells it to a butcher who has slaughtered it and retailed to customers, shall the mortgagee demand of the butcher a return of the animal? We rule this point also against the defendants.

IV. The question of ratification of the sale of the cattle by plaintiffs' receiving a portion of the proceeds, was properly submitted to the jury. They were properly instructed that in order to find a ratification they must believe plaintiffs knew of the sale and that the money which was paid them arose from said sale. *Windsor v. Bank*, 18 Mo. App. 665.

The authorities collected by appellants' counsel will be found in the brief. Many of them, in the view we have taken of the facts of the case, are considered inapplicable. Among those cited is a late case of *Frizzel v. Rundel*, in which it is held that an auctioneer who receives and sells household furniture of the mortgagor without *actual* notice of the mortgagee's title is not guilty of conversion, though the mortgage was duly recorded. We find ourselves unable to agree to this proposition. The judgment will be affirmed. All concur.

STATE *ex rel.* T. E. TUDOR, Respondent, v. THE COUNTY COURT OF PLATTE COUNTY AND THE JUSTICES THEREOF, Appellants.

Kansas City Court of Appeals, April 14, 1890.

Criminal Cases: SEDUCTION: COUNTY LIABLE: PROSECUTRIX NOT. On an indictment for seduction, where a *nolle prosequi* is entered on the defendant's marrying the prosecutrix, the county is liable for the costs of prosecution. Prosecutrix, in such case, cannot be adjudged liable therefor.

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Appeal from the Platte Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

John W. Coots, for the appellants.

(1) The defendant George McLain was indicted for the commission of a felony, and was not convicted of a lower grade of offense. It is the conviction and sentence which establishes the grade of the offense for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. *State ex rel. v. Carpenter*, 51 Mo. 555. (2) The cost bill was not legally and properly certified by the circuit judge and prosecuting attorney, as required by law. R. S. 1889, secs. 4414, 4415, 4396, 4397 and 4398. (3) The judgment should have been arrested, because the petition of relator did not state facts sufficient to authorize or warrant the court in issuing its peremptory writ of *mandamus* against defendants.

A. D. Burnes, *J. W. Coburn*, for the respondent.

(1) R. S. 1879, sec. 1259. (2) In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them, or it shall be otherwise provided by law. R. S. 1879, sec. 2095; *State ex rel. v. Holladay*, 67 Mo. 299. (3) The defendant McLain was not liable for the costs, as his marriage with the seduced woman was "a bar to any further prosecution

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of the offense." The *nolle pros.* was, in effect, an acquittal (R. S. 1879, sec. 1259), and, besides, there was no judgment against him. (4) There was no judgment against any "prosecutor" for these costs, nor is there any other provision made by the law for their payment, except by the county. R. S. 1879, sec. 2095. (5) There is nowhere in the case any suggestion of any prosecutor or prosecuting witness as contemplated by section 2101. That section is based on section 1800, Revised Statutes, 1879, which requires the indorsement of a prosecutor only in cases not amounting to a felony. *State v. Huiatt*, 31 Mo. App. 302; *State v. Rogers*, 37 Mo. 367, see point in brief therein; *State v. Allen*, 22 Mo. 318. And the offense charged against McLain was a felony. R. S. 1879, sec. 1259; *State v. Reeves*, 97 Mo. 668. (6) The case of *State ex rel. v. Carpenter*, 51 Mo. 555, cited and relied on by appellants, is not in point, it having reference to the costs on conviction, and not to the costs on acquittal. (7) Appellants cannot, for the first time, in this court, raise the point that the cost bill was not legally and properly certified by the circuit judge and prosecuting attorney.

Ellison, J.—At the November term, 1888, of the Platte circuit court one George W. McLain was indicted under section 1259, Revised Statutes, 1879, for the seduction under promise of marriage of an unmarried female of good repute under the age of twenty-one years. At the April term, 1889, of said court, the case coming on for trial and a jury impaneled, the defendant elected to marry the seduced woman, was married to her in open court, and the indictment was thereupon dismissed by the prosecuting attorney. In due time thereafter, and in accordance with the law, a fee bill for the costs in said case was, by the clerk of said court, made out against the county of Platte, and having been duly approved and attested by said prosecuting

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attorney and circuit judge and certified by said clerk, was presented to the county court of Platte county for allowance, which was refused by said county court, whereupon, at the August term, 1889, a proceeding in *mandamus* was instituted in said Platte circuit court against said Platte county court, and, upon hearing thereof, a peremptory writ was awarded, from which defendants have appealed.

The sole question that was tried below, and is for trial here, is whether the county of Platte is liable for the costs arising under the above-mentioned indictment.

The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The *nolle prosequi* amounted to an acquittal in the sense of the statute.

In all capital cases in which the defendant is convicted, and all cases in which the defendant may be sentenced to the penitentiary, and he in either case be unable to pay the costs, the state shall pay them, except such as he incurs. Revised Statutes, 1879, section 2093. So, if the defendant be acquitted in a capital case or in a case where the punishment is solely in the penitentiary the state shall pay the costs. Section 2095. "And in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them, or it shall be otherwise provided by law." Section 2095. In this case the punishment may be either imprisonment in the penitentiary or by fine and imprisonment in the county jail (section 1259), and it is therefore not a case "in which imprisonment in the penitentiary is the sole punishment for the offense" which, by the terms of section 2095, is the prerequisite to the state's liability where the defendant is acquitted. The state, therefore, is not liable for relator's costs.

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We find no other provision of the statute for paying them than that contained in the second division of section 2095, which we have quoted. No prosecutor has been adjudged to pay them; nor do we believe this to be a case where the prosecutor could be so adjudged, as it does not fall under either of sections 2096, 2098, 2099, 2100 or 2101, these being the only sections relating to a prosecutor's liability. Our opinion, then, is, that the county should pay the relator's costs. The judgment is affirmed. All concur.

JACQUEMIN AND SHENKER, Appellants, v. F. M. ANDREWS *et al.*, Respondents.

Kansas City Court of Appeals, April 14, 1890.

Schools: DRAWING WARRANT: LIABILITY OF DIRECTORS. If the directors limit their drafts for any school year on any fund to the amount thereof derived from all sources for that year, the drawing of a warrant on such fund, when there is no money in it at the exact date of such warrant, and when the directors knew such fact, is not such an unauthorized exercise of power as to make them personally liable for the amount of the warrant so drawn, there being no fraud nor consequent damage or loss.

Appeal from the Platte Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

C. H. Hillix and *James W. Coburn*, for the appellants.

(1) Petitions shall be liberally construed, "not most strongly against the pleader." *Stillwell v. Hamm*, 97 Mo. 585. (2) Ordinary school districts are not public corporations. 1 Morawetz Private Corp., sec. 6,

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p. 6; *Heller v. Stremmel*, 52 Mo. 309. Only an incorporated school district is a public corporation. *Heller v. Stremmel*, 52 Mo. 309; 1 Dillon Munic. Corp. [3 Ed.] sec. 22, p. 29. (3) Even a public agent is liable for the issue of an inadequate security. Wharton on Agency, sec. 512, p. 335. Or for the issue of an unauthorized security. 1 Morawetz Private Corp., sec. 574, p. 545. (4) Every agent is liable "where he has no authority and knows it, but nevertheless makes the contract as having such authority." *Humphrey v. Jones*, 71 Mo. 62; *Heath v. Goslin*, 80 Mo. 310; *Wright v. Baldwin*, 51 Mo. 271. (5) "A person who assumes to contract as an agent must see to it that his principal is legally bound by his act; for if he does not give a right of action against his principal the law holds him personally responsible. It is not for the plaintiff to show that he had no authority; the defendant must show affirmatively that he had." *Lapsley v. McKinstry*, 38 Mo. 247. (6) In any event the directors are liable for the warrants issued after the Laws of 1885, page 242, went into effect.

No brief for respondents.

Smith, P. J.—The defendants in this case interpose a demurrer to the plaintiffs' petition, on the ground that it failed to state a cause of action, which was sustained; judgment was rendered for the demurrant and from which plaintiffs have appealed.

It stands admitted by the demurrer, so far as we are at present concerned, that the defendants, who were directors of the school district mentioned in the petition, lawfully engaged Olive Cook as teacher in said school district for the school year ending in the spring of 1886, and that on February 5, 1886, a warrant was issued and delivered to her by order of defendants, as such directors, signed and attested as required by law in payment of her services as such teacher, and drawn on the treasurer of Platte county for $33.33 payable out of any

funds in the hands of such treasurer for the payment of teacher's wages belonging to said district, when there then were no funds in the hands of said county treasurer, belonging to said school district for the payment of teachers' wages, which defendants then well knew, and that the plaintiffs were the legal owners of said warrant, etc.

The question is, therefore, whether from these admitted facts the circuit court was authorized to deduce the legal inference of the non-liability of the defendants in their individual capacity. The learned circuit court judge in his opinion, which is in the record, states the ground which influenced his action in sustaining the demurrer to be:

"*First.* The defendants, as directors of a school district, were public agents; as such, all persons were required to take notice of the extent of their authority, and of all limitations thereon, for the reason that their authority and the limitations upon it were fixed by public statute law, of which all persons were bound to take notice. No person could, therefore, be misled or deceived as to the extent of their authority.

"*Second.* The county treasurer's books, at the time said warrant was issued, would have shown whether any funds were on hands for the payment of teachers' wages, and the teacher to whom the warrant was issued and the directors had equal opportunities of knowledge as to the state of said funds.

"*Third.* The warrant purports to be the obligation of the district; on its face it contains no personal undertaking of the directors, and could only have been accepted as the warrant of the district.

"*Fourth.* The warrant was issued for a past consideration. The services had already been rendered under a contract with the district, and upon the faith of the district only; the defendants were merely the medium of transferring, by this warrant, certain funds

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of the district to the teacher for certain services already rendered, upon the credit of the district only.

"*Fifth.* It does not appear from the petition that any credit was at any time extended to the directors, or that their personal liability was contemplated by either party at the time the warrant was issued, or that they intentionally misled any one to his prejudice or that the teacher misunderstood their official relation or the character and object of the official act in issuing the warrant, or that he didn't understand all the facts, or have the same opportunity for understanding as the directors.

"The mere fact that the district may not be bound does not necessarily bind the directors personally. The foregoing considerations were applied and illustrated in the following cases, which very pointedly bear upon the issue involved: 8 Mo. App. 373; 84 Mo. 578; 71 Mo. 62; 30 Mo. 491; 17 Mo. 488; Story of Agency, sec. 265."

This seems to be a fair and correct statement of the law of the case. We may add that the government of the school district is vested in a board of directors, composed of three members. Their powers and duties are prescribed by statute. For the performance of these duties they receive no salary or compensation. It is a trust reposed in them, the execution of which is oftentimes attended with difficulty and embarrassment; and the question which we have to determine is, whether these officers are personally liable upon the facts stated in the petition, which stands admitted by the demurrer. The allegation is that they caused an order to be drawn on the county treasurer for teacher's wages, when they knew there was then no money in that fund. It is not alleged that there did not afterwards, during that school year, come into the teacher's fund moneys from the state, county or district, out of which said warrant could be paid, so that there was no provision made to meet it. We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said

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warrant on the treasury, unless there was money on hand of that fund, out of which it could be paid, still this prohibition must not be construed so as to preclude the directors from anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury for that school year, from either or all of the three sources from which that fund, by law, is derived.

The provisions of the school law must be construed liberally so as to give them a practical effect. It might have been that the collection of the amount of the estimate of the annual meeting, for carrying on the school for that year, was delayed for some reason or that the income into the teachers' fund from the state or county may have been delayed, by reason of the default or miscarriage of some officer intrusted by law with the collection or disbursement of this fund, and thus it may have been prevented from reaching the county treasury at the proper time. We cannot think a warrant drawn upon the county treasury, under such circumstances when there was no fund then on hand to pay it, would hardly be deemed illegal or unauthorized. If the directors limit their drafts for any school year on this fund to the amount thereof derived from all sources for that year, it is not believed that because there is no money in the fund at the exact date of any warrant, and they knew this fact, this would be such an unauthorized exercise of power as to make them personally liable for the amount of the warrant so drawn. For aught that appears by the petition in this case, there may have, subsequently to the date of said warrant, come into the hands of the county treasurer money of this fund out of which the same could have been paid. It is not charged in the petition that the defendants were guilty of any fraud or abuse of their trust, nor that the plaintiffs had suffered any damage or loss in consequence thereof. There is no allegation that they have, in the performance of their official function, departed

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from the requirements of the constitution or the statute except that they have caused a warrant to be drawn on a fund in which there was no money, at the time, and which they knew. To hold that the humble but necessary public duties of school directors can only be undertaken at the hazard of personal liability for every warrant to be drawn on the county treasury, when there does not happen to then be money in the fund against which it is drawn, is a doctrine too hard to be enforced in any court. There is no allegation of deceit or other misbehavior of these directors, which renders them liable *on the warrant sued* on. We think the petition states no cause of action upon these school warrants or any of them in favor of the plaintiffs, and that the judgment should be affirmed. All concur.

DONNELL MANUFACTURING COMPANY, Appellant, v. WILLIAM S. HART, Respondent.

Kansas City Court of Appeals, April 14, 1890.

1. **Appellate Practice**: JOINDER IN ERROR. Sections 3764 and 3765, Revised Statutes, 1879, have been omitted from the revision of 1889, and it is not now required to assign and join in error more than such assignment may be made by briefs required by section 2301 of the late revision.

2. **Account**: DEFENSE: PROTECTION IN SALE OF GOODS: CASE ADJUDGED. Plaintiff sued for balance of account for sale of certain proprietary medicines. The defense was that plaintiff had agreed to protect the defendant in the sale of the goods, and, after he had been indicted for selling liquor in four cases, had told him to get a lawyer and fight the cases. After this defendant compromised the cases by pleading guilty to one indictment and being fined forty dollars and paying the costs in the others. *Held*, that the evidence did not sustain the defense; the condition to the plaintiff's liability to defendant was that he employ a lawyer and fight the cases; and defendant could not put a liability upon the plaintiff outside of the agreement.

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Appeal from the Boone Circuit Court.—HON. G. H. BURCKHARTT, Judge.

REVERSED AND REMANDED.

C. B. Sebastian, for the appellants.

Even though it was binding upon plaintiffs, defendant is not entitled to rely upon it as he did not carry out the request; he did not fight the cases, but plead guilty, without the knowledge or consent of plaintiffs. Hence he is not entitled to the damages claimed, but if the court should consider the testimony as to whether these cases could be successfully defended it is overwhelmingly in our favor, and had a fight been made would have resulted in defendant's acquittal so far as the character of the medicine was concerned. It might have convicted him in his abuse of the medicine and making of it a beverage, which he promised in his letter he would not do, and which plaintiff's notice to him prohibited.

ELLISON, J.—This action is on account for merchandise sold to defendant. It was begun before a justice of the peace. Defendant filed no pleading in the cause. Plaintiff appeals. Defendant's motion to dismiss the appeal which was submitted with the cause will be overruled. The first ground of the motion is that as the cause originated before a justice of the peace there are no written pleadings, and that there is, therefore, nothing in this record showing issue joined. By reference to article 12, Revised Statutes, 1889, it will be seen that sections 3764 and 3765, Revised Statutes, 1879, have been omitted from the new revision, and that it is not now required to assign and join in error more than such assignment may be made by briefs required by section 2301, Revised Statutes, 1889. The second

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ground is that no sufficient abstract was filed by appellant. We are of the opinion the abstract presents sufficient basis for the points presented by appellant.

The account sued on is for certain proprietary medicines furnished to defendant, the balance claimed being $113.05. The defense made is that in the sale of the medicine the plaintiff's traveling salesman undertook and agreed verbally with defendant that plaintiff would protect him in the sale of the medicine, and that if he was indicted and fined plaintiff would pay the fine, the costs and the attorney's fee. That, in the spring of 1887, he was indicted in four cases for selling liquor, whereupon he employed an attorney, and in October, 1887, he went to St. Louis and called upon plaintiffs and informed them of the indictments and what their salesman had said, when plaintiffs, as stated by defendant, "did not seem to want to do anything, but I pressed the matter and he (plaintiff) finally said get a lawyer and fight the cases and if they fine you we will stand the loss." After this defendant compromised the cases by pleading guilty to one indictment and being fined forty dollars and paying the costs in the others. He did this without notifying plaintiffs and without their knowledge or consent.

The question is, does this evidence sustain the defense. We think not. The condition to plaintiff's liability to defendant was that he employ a lawyer and "fight the cases." Plaintiffs contended their goods were genuine medicine and not intoxicating beverages, and had a right to claim in this sort of case that if the contest had been made defendant would have been acquitted. Plaintiff's consent to the compromise should have been obtained. If they had been advised, how is it to be known but that they could have gotten better terms, possibly a dismissal of all the cases by paying the costs? It is wholly unreasonable to permit defendant without consulting plaintiffs to put a liability upon

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them outside of their agreement. How could it be known that defendant would have been convicted for selling *plaintiffs' medicines.* The indictments were for selling intoxicating liquors. Under such indictments there might have been a conviction for selling any intoxicating liquor whether that gotten of plaintiffs or any other. Though the prosecuting attorney testified that the indictments were found on evidence before the grand jury of the sale of "bitters and cordials," as these were not specified in the indictment and the state could have proved the sale of any other intoxicating liquors, the testimony does not aid the defense. A suggestion will perhaps show more clearly that defendant's defense is not tenable. Suppose he was a plaintiff suing these plaintiffs on the agreement set up, could he have recovered of them without showing a compliance with the condition, to their liability; that is, that he had contested the cases and lost? We think not. Plaintiff's account seems to have been conceded to be correct and we will, therefore, reverse the judgment and remand the cause with directions for the circuit court to enter judgment for the amount of claim. All concur.

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PETER DAVIS, Appellant, v. J. F. CLARK, Respondent.

Kansas City Court of Appeals, April 14, 1890.

1. **Trial Practice:** DEMURRER TO EVIDENCE. Every reasonable inference of fact to be drawn from the evidence is to be thrown on the side of the plaintiff in passing on a demurrer to the testimony.

2. **Waste:** RULE AS TO CUTTING TIMBER. In this country where timber in many places is a hindrance to the enjoyment of the estate, whether it be for life or in fee, the law is, that cutting for the purpose of cultivation (if it do not lessen the value of the inheritance) is a privilege following a tenancy for life, when it is necessary for the proper and reasonable enjoyment of the estate, and as

long as the tenant only acts in so doing in conformity to good husbandry, regard being had to the situation of the country and the comparative value of the timber; and, therefore, cutting timber, not for firewood, repairs to the premises or for cultivation, but for converting it into railroad ties for the market, is waste.

3. **Evidence:** THREATS. When the question is whether a person has done a particular thing and some evidence of it has been given, it is surely competent to show in corroboration that he had avowed his purpose beforehand.

4. **Waste:** NEGATIVE AVERMENT: DEFENSE. The statute declaring that if a tenant for life shall commit waste "without special license in writing so to do, he shall be subject to civil action," etc., does not impose upon plaintiff the burden of proving that defendant had not the special license, but is matter of defense which must be established by the defendant.

5. **Amendment:** CAUSE OF ACTION ARISING AFTER SUIT COMMENCED. In actions at law, whatever may be the rule in equity, the cause of action must be complete at the beginning of the suit; and filing an amended petition does not open up to plaintiff a cause of action accruing after the original petition was filed, and it operates only as a re-statement of a cause of action existing at the beginning.

Appeal from the Cole Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED AND REMANDED.

Silver & Brown, for the appellant.

(1) The court improperly sustained the demurrer to the evidence. Where there is any evidence to sustain plaintiff's action the case should be submitted to the jury. *Twohey v. Fruin*, 96 Mo. 104; *Walsh v. Morse*, 80 Mo. 568; *Charles v. Patch*, 87 Mo. 450; *Baum v. Fryrear*, 85 Mo. 151; *Ward v. Davidson*, 89 Mo. 445; R. S. 1879, sec. 3573; *Clark v. Clark*, 86 Mo. 115. (2) The court erred in refusing to permit plaintiff to prove acts of trespass between the filing of the original and amended petitions. Pomeroy on Remedies & Remedial Rights [2 Ed.] p. 27, sec. 28, *et seq.; Ward v. Davidson*, 89 Mo. 445; *Railroad v. Calkins*, 90 Mo.

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538. (3) There was sufficient evidence to go to the jury on the acts of waste committed before the bringing of the suit. It will be remembered that such demurrer admits everything which the testimony of plaintiff conduces to prove, even though only in a slight degree. And in passing on it the court will make every inference of fact in favor of the party offering the evidence which the evidence warrants, and which the jury might with any degree of propriety have inferred. *Wilson v. Board of Ed.*, 63 Mo. 137; *Frick v. Railroad*, 75 Mo. 601; *Smith v. Hutchinson*, 83 Mo. 683; *Herriman v. Railroad*, 27 Mo. App. 435. Plaintiff is only called upon to make out a *prima facie* case. *Herriman v. Railroad, supra*. *Twohey v. Fruin*, 96 Mo. 109. (4) This case was an action for waste, founded on Revised Statutes, 1879, section 3107, *et seq.* *Proffit v. Henderson*, 29 Mo. 325; *Wilkinson v. Wilkinson*, 52 Wis. 557. *First.* The jury is to determine in such case whether by clearing the lands the tenant has cut so much timber as to injure the inheritance. 1 Washburn on Real Property [5 Ed.] p. 148, star p. 109. The same proposition is also decided in *Proffit v. Henderson*, 29 Mo. 325. *Second.* The value of the timber cut was competent evidence on the question of the injury done to the inheritance of which the jury must judge. *Harder v. Harder*, 26 Barb. 414. *Third.* So threats of the commission of acts of waste and trespass are admissible in evidence against the person making them. *Dodge v. Bache*, 57 Pa. St. 421; Abbott's Trial Evidence, p. 630; *Platte Co. v. Marshall*, 10 Mo. 345. It seems the court had some doubts on the last proposition, and we respectfully ask this court to pass on it, particularly if a new trial is awarded. (5) It cannot be objected that plaintiff failed to show that defendant did not have special license in writing to cut the timber. *First.* The burden of proof of a special license or authority is on the defendant. 1 Wharton on Evidence, sec. 368; *Medlock*

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v. Brown, 4 Mo. 379; *Wheat v. Slate*, 6 Mo. 455; *State v. Lipscomb*, 52 Mo. 32. *Second.* Besides, it is inferable from the evidence that defendant did not have any special license in writing to do the cutting. He denied the cutting, said he didn't do it, rested his defense on that question, thereby impliedly, at least, admitting he had no special license in writing. Where a party has the burden of proving a negative, full proof "is not required, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party." 1 Wharton on Ev., sec. 368. *Third.* A plaintiff need only allege and prove a *prima facie* case. *Crane v. Railroad*, 87 Mo. 588; *Herriman v. Railroad*, 27 Mo. App. 435. In *Proffit v. Henderson*, 29 Mo. 325, the petition was held to be sufficient, although it did not state that defendant did the cutting without "special license in writing." We submit the judgment of the circuit court should be reversed.

W. S. Pope, for the respondent.

(1) We submit in this case that the action of the court in sustaining a demurrer to the testimony was correct. The action was clearly intended to be brought under section 3921, Revised Statutes, 1879. The allegation in the petition is, that the defendant is in the possession of the lands alleged to have been trespassed upon, and that he has an interest therein, that he is tenant by the curtesy. In order to maintain the action, the plaintiff must allege and prove that defendant has no interest or right in the lands. R. S. 1879, sec. 3921; *Brown v. Carter*, 52 Mo. 46; 2 Waterman on Trespass, pp. 448, 447, 452, 454; 3 Blackstone, ch. 12. (2) The petition does not state an action for trespass at common law, for at common law possession is necessary to maintain the action. See cases cited above, also

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2 Waterman, ch. 5. The plaintiff in this case cannot possibly recover, if everything stated in the petition, everything proved, or offered to be proved, was true, hence a demurrer to the testimony was proper. See cases cited above. (3) The plaintiff's remedy, if any he has, is in chancery, to restrain the cutting of timber from his inheritance or for waste. 2 Waterman on Trespass, p. 571, sec. 1126, *et seq.;* 1 High on Injunctions, ch. 11, p. 423; ch. 12, p. 451, especially sections 716, 728 and 724. (4) The nature of tenancy, by curtesy in this state, depends on the common law, there being no statutory provision giving character to the estate. *Tremmel v. Klieboldt*, 6 Mo. App. 549. (5) The distinction between waste and trespass consists in the former being the abuse or destructive use of property by one who, while not possessed of the absolute title to the property, has a right to its legitimate use; trespass is an injury to property by one who has no right whatever to its use. 1 High on Injunctions [2 Ed.] sec. 650; Minor's Institutes, p. 546. The case of *Proffit v. Henderson*, 29 Mo. 325, instead of being a case in favor of appellant, is against him. It was not proven, nor was evidence offered by appellant to prove, that the cutting complained of decreased the value of the land, or was a spoliation of the appellant's inheritance. This was necessary in order to make a case. The court in this case well remarks, that it is not waste in this country to clear land, by a tenant for life. (7) There was no allegation or proof that the timber was cut "without special license in writing." This is made a necessary averment by section 3107, Revised Statutes, 1879, and must be proved as any other material fact. The question as to the materiality of this averment was not before the court in the case of *Proffit v. Henderson*. It was not discussed or ruled upon by the court. (8) The action stated in the amended petition is a different one and for a different

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amount stated in the original. The evidence that would make a case in the one would not in the other, and this is the true test.

ELLISON, J.—Plaintiff is the owner of the reversionary interest in certain lands of which defendant is the owner of the estate by the curtesy. The action is for waste by alleged injury to the inheritance in cutting trees. There was a demurrer to the testimony offered by plaintiff, which, being sustained, plaintiff appealed. It is singular that in a case depending so much on dates and descriptions of land that there should be such indefiniteness as appears from the testimony introduced. There is sufficient in the evidence, however, to submit to the jury the question whether defendant did cut trees before the commencement of this suit on the land of which plaintiff owned the reversionary interest. Without analyzing the testimony, our opinion is, that, under the rule that every reasonable inference of fact to be drawn from the evidence is to be thrown on the side of the plaintiff, in passing on a demurrer to the testimony, the case, so far as concerns the doing of the act charged, was sufficient to submit to the jury.

But defendant's contention is, also, that the act was not shown to be waste, in that plaintiff did not show that the destruction of the timber was not for the purposes of cultivation or other lawful purpose allowed a tenant for life. Waste is that which does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. In this country, where (at least until recent years) timber in many places is a hindrance to the enjoyment of the estate, whether it be for life or in fee, the law is that cutting timber for the purpose of cultivation (if it did not lessen the value of the inheritance) is a privilege following a tenancy for life, when it was necessary for the proper and

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reasonable enjoyment of his estate, and as long as he only acts in so doing in conformity to good husbandry, regard being had to the situation of the country and the *comparative* value of the timber. But this is a privilege which can only be exercised for the purpose mentioned, *i. e.*, the proper enjoyment of the estate, which is hindered by the timber. So it has been held that the tenant cannot cut the timber merely for sale. *Padleford v. Padleford*, 7 Pick. 152; *Clemence v. Steer*, 1 R. I. 272; *Chase v. Hazelton*, 7 N. H. 171; *Parkins v. Cox*, 2 Hayw. (N. C.) 339. Applying these principles to this case, we find that the evidence tended to show that defendant was cutting and destroying the timber, not for firewood, repairs to the premises or for cultivation, but for the purpose of converting it into railroad ties for the market. This in our opinion, if established to the satisfaction of a jury, would constitute waste for which he would be liable.

II. The question is raised whether threats to cut the timber off the land were admissible against the defendant as tending to show he committed the act. We think they are undoubtedly proper testimony. Not that threats alone would make a case against defendant, but, in connection with other evidence tending to implicate him, they are competent for the consideration of the jury. "When the question is whether a person has done a particular thing, and some evidence of it has been given, it is surely competent to show in corroboration that he had avowed his purpose beforehand." *Dodge v. Bache*, 57 Pa. St. 421.

III. The statute, 1879, section 3107, declares that if a tenant for life or year shall commit waste "without special license in writing so to do, he shall be subject to civil action," etc. And defendant contends that it is incumbent upon the plaintiff to prove that he had not the special license. We think such matter is a negative averment, which will be taken to be true unless met by

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proof from defendant; that, though alleged by plaintiff, if not true, it is a matter of defense, which must be established by defendant. *State v. Lipscomb*, 52 Mo. 32.

IV. Plaintiff filed an amended petition in this cause, in which he charged waste to have been committed since suit was instituted. Evidence of such waste was excluded by the court, and, we think, properly. In actions at law, whatever may be the rule in equity, the cause of action must be complete at the beginning of the suit. "If it is not then complete, the complaint of the plaintiff must of necessity be either *untrue* or *insufficient in law*." Gould's Plead. 161. Filing an amended petition does not open up to plaintiff a cause of action accruing after the original petition was filed, and it operates only as a re-statement of a cause of action existing at the beginning. Many good reasons were suggested at the argument why plaintiff's contention should be allowed, but it is not deemed to be the law, and we rule the point against the plaintiff. For reasons foregoing, the judgment will be reversed, and the cause remanded. GILL, J., concurs; SMITH, P. J., not sitting.

ROBERT P. SMITH *et al.*, Appellant, v. T. C. VAN WYCK, Respondent.

Kansas City Court of Appeals, April 14, 1890.

Guaranty: SINGLE OR CONTINUOUS DEALING: RULE OF CONSTRUCTION. When it is doubtful from the language contained in the contract whether the guaranty was for a single dealing or for a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if in fact he did accept it; so where M. a tenant of defendant, placed orders for goods to the amount of

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thirteen to seventeen hundred dollars with plaintiffs, wholesale merchants, who thereupon told defendant, if he would guarantee the payment of thirteen hundred dollars, they would fill the orders and take their chances on the excess; and plaintiffs then executed this writing: "I hereby guarantee the payment of bills as they mature purchased by M. of R. P. Smith & Sons * * * to the amount of thirteen hundred dollars." ***Held*****, said writing was not intended to be a continuing guaranty.**

Appeal from the Jackson Circuit Court.—HON. TURNER A. GILL, Judge.

AFFIRMED.

Jenkins & Wells, for the appellant.

"If there is doubt on the face of the instrument as to whether or not it is a continuing guaranty the words used are to be received and accepted in the strongest sense against the party using them." *Shine v. Bank*, 70 Mo. 524; *Wilrath v. Thompson*, 4 Hill. 200; *Pratt v. Mathews*, 24 Hun. 387; *Gates v. McKee*, 3 Kernan (N. Y.) 236; *Seckle v. Marsh*, 44 How. Prac. (N. Y. Rep.) 91; *Merle v. Wells*, 2 Campbell, 413; *Mason v. Pritchard*, 12 East. 227; *Mayer v. Isaacs*, 6 Meeson & Wellsby, 610; *Barton v. Bennett*, 3 Camp. 220; *Hargreave v. Snell*, 6 Bing. 244; 2 Parsons Cont. [6 Ed.] 494 and 499; Brandt on Guar., sec. 130.

C. O. Tichenor, for the respondent.

(1) Had declarations of law been given or refused, and exceptions saved, so as to have raised the question, it could not be held that the guaranty was a continuing one. *Boehne v. Murphy*, 46 Mo. 57; *Shine's Adm'r v. Bank*, 70 Mo. 533; *Schwartz v. Heymen*, 107 N. Y. 562. (2) While it may be true that notice was not required to defendant as to the goods bought at date of guaranty, yet as to future purchases, under the circumstances,

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plaintiffs should have given notice. *Bank v. Shine*, 48 Mo. 409; *Machine Co. v. Jones*, 61 Mo. 409; *Taylor v. Shouse*, 73 Mo. 361.

SMITH, P. J.—The abstract of the record in this case does not conform to the requirements of rule 15 governing practice in this court. It does not set forth the pleading, or the substance thereof. Nor the substance of the evidence, for numerous references are made in the plaintiff's combined brief and argument, to pages of the transcript for what the evidence there conduces to show. It does, however, contain extracts from the record of the evidence, but nothing more. It is not disclosed by the abstract that there were any instructions asked, given or refused, or that there was a motion for a new trial filed, and overruled in the case. The defendant had judgment and plaintiffs appeal.

I. While the abstract is exceedingly imperfect, it does appear therefrom that the plaintiffs sued defendant upon this undertaking:

"KANSAS CITY, Mo., July, 1885.

"I hereby guarantee the payment of bills as they mature, purchased by E. S. Mendenhall of R. P. Smith & Sons, of Bloomington, Illinois, to the amount of thirteen hundred dollars ($1300).

"T. C. VAN WYCK,

"1501 East Eighteenth Street,"

For a bill of goods amounting to $1,240.60, sold by plaintiffs to said Mendenhall. The facts and circumstances surrounding the execution of the said undertaking, and the relation of the parties thereto, and to each other, may be summarized thus: Defendant had rented to Mendenhall a store and business house. Mendenhall had placed with one of the plaintiffs, who were wholesale merchants, an order for goods amounting from thirteen hundred to seventeen hundred dollars. The plaintiffs hesitated about filling the order, and

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one of them went to defendant and told him that Mendenhall had placed with them an order for goods to the amount stated, and that they did not like to fill the same unless defendant would guarantee the payment thereof; that if defendant would give his guaranty for thirteen hundred dollars, and if they sold Mendenhall more goods than that, on such excess they would take their chances for collecting. That thereupon the defendant signed the undertaking sued on. The plaintiffs delivered Mendenhall goods to the amount of the defendant's guaranty, for the payment of which the defendant furnished part of the money. The plaintiffs thereafter continued to sell goods to Mendenhall for about two years, amounting in the total to several thousand dollars. Finally Mendenhall failed, owing the plaintiffs on account of such sales the amount sued for. It may be well doubted whether any question of interpretation of the said undertaking properly arises on the abstract of the record before us, and at which alone we can look. But, waiving the consideration of that question for the present, we may state that it appears to us that if we interpret the language of the said undertaking in the light of a knowledge of the relation of the parties, their antecedent acts, and of the subject-matter of the same, as we have the right to do (2 Parsons on Contracts [7 Ed.] top p. 564; *Edwards v. Smith, Adm'r*, 63 Mo. 119; *Bunce, Adm'r, v. Bick's Ex'r*, 43 Mo. 266; *Hutchinson v. Bowker*, 5 Mees. & W. 535; *Black River L. Co. v. Warner*, 93 Mo. 374), it becomes quite obvious that it cannot be held to be a continuing one, and this, too, in view of the maxim, *verba fortius accepiuntur contra proferentem.* It is held in this state that when it is doubtful from the language contained in the contract, whether the guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the

contract the sense in which the person making the promise believed the other party to have accepted it, if, in fact, he did accept it. *Boehne et al. v. Murphy*, 46 Mo. 57; *Shine's Adm'r v. Bank*, 70 Mo. 524. Extrinsic evidence cannot be received to contradict, add to, subtract from or vary the terms of a guaranty, but, as has been stated, when its meaning is doubtful, or obscurely expressed, parol testimony in relation thereto, requisite to a clear understanding of its purport, is admissible. The very language of the instrument sued on negatives the idea that it was intended to be a continuing guaranty. When the relation of the parties, and the circumstances under which the guaranty in question was entered into, are considered, its meaning becomes quite apparent. The fact that plaintiffs had sold Mendenhall goods amounting to thirteen hundred dollars, and that they would not deliver the same to him without defendant would guarantee the payment thereof, coupled with the further fact that this amount was inserted in the instrument, for which defendant bound himself for "bills, as they mature, purchased"—not to be purchased—conclusively shows that the transaction and undertaking related solely and entirely to the unfilled order, or orders, for goods plaintiff had received of Mendenhall, at the time of the execution of the contract, and not to subsequent sales and purchases. We think that upon the record before us the judgment of the circuit court was for the right party. The exceptions to the rulings of the court in respect to the introduction of evidence were not preserved by a motion for a new trial, as appears by the abstract. But, whether this is so, or not, it is quite evident that none of these adverse rulings of the court to the plaintiffs materially affected the merits of the case. Indeed, the plaintiffs, in their brief, make no point in respect to that matter. The judgment, with the concurrence of Judge ELLISON, Judge GILL not sitting, will be affirmed.

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J. L. ALDRIDGE *et al.*, Defendants in Error, V. H. C. SPEARS *et al.*, Plaintiffs in Error.

Kansas City Court of Appeals, December 2, 1889.*

1. **Appeals:** COUNTY COURT: OPENING ROAD. Petitioners in a public road have no such interest in the case as to carry with it the right of appeal from the judgment of the county court denying their petition.

2. ———: ———: ———. The road law permits appeals from the county court in certain specified cases; and from such enumeration the implication is clear that an appeal is denied in other cases, not specified, as the refusal of the petition to open a new road.

3. ———: ———: ———: JUDGMENT. In the determination of a petition for a public road, the county court does not act in a judicial capacity, and the refusal of such petition is not a judgment and no appeal will be therefrom.

Appeal from the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

CERTIFIED TO THE SUPREME COURT.

Chas. E. Yeater, for the plaintiffs in error.

The county court alone has exclusive jurisdiction to open public roads, and if it refuses the circuit court has no such jurisdiction on appeal. R. S., sec. 6967 (Laws of 1887, p. 247, secs. 7, 8, 9, 10); *Foster v. Dunklin*, 44 Mo. 217.

Jackson & Montgomery, for the defendants in error.

There is no longer any question as to the right of the parties aggrieved to appeal from the judgment of

* This case through some mistake or misapprehension did not reach the reporter until August 21, 1890. It will be found affirmed by the supreme court.

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the county court granting or refusing to open a highway. R. S. 1889, sec. 6967; *Jefferson County v. Cowen*, 54 Mo. 237; *Anderson v. Pemberton*, 89 Mo. 65; *State ex rel. v. County Court*, 80 Mo. 503; *More v. Bailey*, 8 Mo. App. 158. *Foster v. Dunklin*, 44 Mo. 217, was decided before the adoption of either section 1210 or 6967 of the Revised Statutes.

Ellison, J.—This cause originated in the county court of Pettis county and arises on a petition for opening a new road and to vacate an old one. The petition was denied by the county court, and the petitioners appealed to the circuit court, where on a trial *de novo* the petition was granted as to the opening of a new road, though no judgment appears in the record as to the vacation of the old road. A commissioner was appointed by the circuit court, and his report was approved by that court which, thereupon, with the aid of a jury, entered into a trial as to the damages to those parties over whose land the proposed road ran who had not relinquished the right of way. The circuit court adjudged the road to be of sufficient public utility to justify the payment of the damages assessed. It ordered the road established, that the parties on its line give possession within six months and directed the road overseer to open the same at the expiration of that time. It was further ordered that the county treasurer of Pettis county draw his warrant on the county of Pettis for the damages assessed as well as for the costs of the case.

Several questions relative to the sufficiency of the petition and the regularity of the proceedings have been presented, as also the further question of the right of the petitioners to appeal to the circuit court from the order disallowing the petition, since, if they had not the right, the circuit court had no jurisdiction. The latter question will dispose of the case, and we will not notice

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the others. It will be noticed that the county court did not assess damages nor open or vacate the road, but refused the petition on the ground that the road was not of sufficient public utility to justify its being opened. Under this state of facts the first point for consideration is, have the petitioners such an interest in the case as to carry with it the right of appeal from the judgment of the county court denying their petition; that court, it may be remarked in passing, being so peculiarly adapted to the determination of such question. The action of the county court has not affected the petitioners. No property interests or rights of theirs have been interfered with or disturbed. They find themselves after the rejection of their petition *in statu quo*. The opening of a new public road is not for the special benefit of the petitioners nor have they any special interests or rights therein. Their interest is no more than any other like number of the general public whose agent the county court is, and for which it acts. Notwithstanding sections 1102, 1210 and 6967, Revised Statutes, 1879, concerning appeals from county courts, the appellant must yet have such personal interest in the proceedings, as distinguished from his interest in connection with the general public, as will give him an appealable interest. *Foster v. Dunklin*, 44 Mo. 216; *Overbeck v. Galloway*, 10 Mo. 364; *Tetherow v. County Court*, 9 Mo. 118. These cases all arose while the statute now found in the revision of 1879 as section 1102 was in force. Under that statute appeals were allowed to parties held to be entitled thereto, but as no trial *de novo* was provided for, such appeal only operated as a *certiorari*. Now, by section 1210, provision is simply made for a trial anew on such appeals, thus covering the difficulty before experienced but in no wise adding additional rights of appeal. So that a party not allowed an appeal before the provision of the trial anew would still not be allowed, and the foregoing

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authorities are as much in point now as before the enactment of section 1210.

II. There is another view of the matter leading to the same result. Notwithstanding section 1102 gives the circuit courts appellate jurisdiction "from the judgments and orders of county courts * * * in all cases not expressly prohibited by law;" and that section 1210 provides that, "in all cases of appeal from the final determination of any case in the county court," there shall be a trial *de novo*, yet section 6967, Revised Statutes, 1879 (from which section 36, page 166, Laws 1883, is copied) provides that: "In all cases of appeals being allowed from the judgment of the county court, *assessing damages, or for opening, changing or vacating any road*, the circuit court shall be possessed of the cause and shall proceed to hear and determine the same anew; but no commissioners shall be appointed by the circuit court, nor shall any appeal prior to the determination thereof in the circuit court operate as a *supersedeas* of the proceedings in the county court." Thus, this section of the road law permits appeals in certain specified cases; the refusal of the petition for a road not being one of them. By such enumeration of cases in which an appeal may be had the implication is clear that it is denied in other cases, even under section 1102, *supra*. Such was the ruling of the supreme court in a case quite applicable to this. *Whitehead v. Stoddard County*, 29 Mo. 138. All of the cases cited by respondent to which we have had access are those falling directly under the provisions of the statute, section 6967, above quoted, and were not where the petition had been merely denied.

III. There is yet another reason which would lead to a denial of an appeal in this case. In the determination of a petition for a road, that is, whether a road is of sufficient public utility to require its opening and the payment of damages, the county court does not act in a judicial capacity. The refusal of the petition is not

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a judgment. It could not be said to be *res adjudicata*. There is nothing in the order of refusal which would prevent another petition for the same thing. It is true that if a petition was granted and afterwards land-owners would refuse the right of way and claim damages, the subsequent proceedings would perhaps become judicial in their character. But, so far as concerns the necessity of a public road, a county court is but the agent for the public. It has been held to be a mere agent in allowing accounts (*Reppy v. Jefferson County*, 47 Mo. 66; *Phelps County v. Bishop*, 46 Mo. 68); in locating county seats (*Iron M. Ry. Co. v. City of St. Louis*, 92 Mo. 160; *State ex rel. West v. County Court*, 41 Mo. 44); in handling school funds (*Ray County v. Bently*, 49 Mo. 236); road funds (*Pettis County v. Kingsbury*, 17 Mo. 479); as well as in granting right of way over streets (*The St. Louis, Iron M. Ry. Co. v. City of St. Louis*, 92 Mo. 160). In the latter case it is held that, notwithstanding the sections of the statute herein referred to, an "appeal can only be taken when the judgment or order appealed from is judicial." Unless, of course, it be specially and directly provided for. We find the foregoing is in direct conflict with the case of *Cox v. Dake*, 34 Mo. App. 80, from the St. Louis Court of Appeals, and we will, therefore, certify this cause to the supreme court for final determination. All concur.

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REBECCA MUNLEY, Respondent, v. A. F. KING AND F. PFAFF, Defendants; F. PFAFF, Appellant.

St. Louis Court of Appeals, April 15, 1890.

1. **Justices of the Peace: REPLEVIN: APPEAL.** If an appeal be taken in an action of replevin from a justice of the peace to the circuit court by the party who holds the possession of the property sued for, the appellant has not the right to dismiss his appeal in the circuit court.

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2. ——— : ——— : ———. If the appellant in such case fail to prosecute his appeal, and the judgment of the justice is informal in that it fails to determine the value of the property, the circuit court is not bound to affirm that judgment, but should, after hearing evidence, find the value of the property and render judgment *de novo* in the alternative form prescribed by the statute.

8. ——— : ——— : ———. In an action in which the value so found by the circuit court exceeded the penalty of the bond of the appellant, *held* that the appellee should have the option between a judgment against the appellant alone for the property or its ascertained value, and a judgment against the appellant and his surety for the property or a sum not exceeding the penalty of the bond.

Appeal from the Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED AND REMANDED.

French & Davis and *Cloud & Helton*, for the appellant.

F. C. Johnston, for the respondent.

BIGGS, J., delivered the opinion of the court.

This suit was instituted before a justice of the peace, and it is for the recovery of the possession of personal property. The plaintiff gave no bond, and the defendants retained the property. In such cases, the mode of procedure is prescribed by section 2898, Revised Statutes, 1879, which is as follows:

"When the plaintiff does not ask for the possession of the property pending the suit, or fails to file the bond required of him, or when the property claimed has not been taken from the possession of the defendant, the cause shall proceed as if the same had been taken by the officer; and if it shall appear from the testimony on the trial, that the property was in the possession of the defendant at the date of the issue of the writ or summons, and that plaintiff was entitled to

the possession of the same, and the defendant wrongfully detained the same from plaintiff, the justice or jury shall find for the plaintiff accordingly, and assess the value of the property, and damages for the taking or detention of the same, and injuries thereto, and the justice shall render judgment that the plaintiff recover said property, and the damages assessed with costs of suit, and that if said property shall not be found, or, at the discretion of the plaintiff, he shall recover the assessed value of said property, with the damages assessed and costs of suit."

There was a trial of the cause without the intervention of a jury, and the justice, after finding that the plaintiff was the owner of the property and that it was wrongfully detained by the defendants, entered on his docket the following judgment: "It is, therefore, considered and adjudged by the justice that the plaintiff do have and recover from the said A. F. King and F. Pfaff, defendants herein, said property, and the sum of one cent so assessed as damages with her costs herein expended, taxed at $4.20." From this judgment the defendant Pfaff appealed.

In the circuit court Pfaff offered to dismiss his appeal, but the court held that this course was not allowable. When the case was called for trial defendant declined further action, and the court thereupon affirmed the judgment of the justice touching the plaintiff's ownership of the property and her right to the possession thereof, and proceeded to hear testimony concerning the value of the property detained by the defendant, and the damages sustained by the plaintiff on account of its detention.

At the conclusion of the hearing the court, in accordance with the statute, ordered that the defendant Pfaff return the property to the plaintiff, or that the latter have judgment against the defendant and the surety on his appeal bond for the sum of seventy-five

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dollars, the value of the property as ascertained by the court. The judgment also included the damages for the detention of the property and for costs of suit. From this judgment Pfaff again appealed.

The defendant challenges the judgment on two grounds:

First. The court committed error in refusing to dismiss the appeal on the defendant's motion.

Second. The court had no right to hear evidence concerning the value of the goods.

The cases cited by the defendant's counsel in support of the first proposition only treat of a plaintiff's right to take a non-suit or to dismiss his appeal. The doctrine announced by these cases cannot be made to apply to a defendant. *Turner v. Northcut*, 9 Mo. 251; *Lee v. Kaiser*, 80 Mo. 431; *Earl v. Hart*, 89 Mo. 263.

But there are exceptional cases wherein the plaintiffs are not permitted to pursue such a course. An action of replevin, when the property is in the possession of the plaintiff, forms one exception. *Ranney v. Thomas*, 45 Mo. 111; *Collins v. Hough*, 26 Mo. 149; *Berghoff v. Heckwolf*, 26 Mo. 511. In such a case the law will not permit the plaintiff to dismiss his action or his appeal, as the case may be, and thereby escape an order against himself for the return of the property, or a judgment against him and his sureties as provided by the statute. We must, therefore, conclude that when the appellant in a replevin suit has the possession of the property he cannot dismiss the appeal or take a non-suit, as the case may be, for the reason that such action would defeat the right of the other party to a summary judgment on the appeal bond for the value of the property.

But defendant's counsel say, that, if the right of the defendant to dismiss the appeal did not exist, the circuit court, in case the defendant declined to prosecute his appeal, could only affirm the judgment of the justice; and as the justice failed to find the value of the

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property, the circuit court was precluded from so doing. Therefore, it is urged that the court erred in hearing evidence as to the value of the property, and that consequently its judgment in respect of the value is erroneous.

Section 1000, Revised Statutes, 1879, provides that in cases of appeal from the judgment of a justice of the peace, if the appellant fails to prosecute the appeal according to law, the judgment of the justice shall be affirmed. In most instances when such conditions exist, the introduction of any evidence on the part of the appellee becomes unnecessary; but it does not follow that the circuit court in all cases would be precluded from hearing evidence for any purpose. It must be borne in mind that a judgment of affirmance in the circuit court is an independent and original judgment and one of recovery against appellant and the sureties on the appeal bond. In this respect it is essentially different from the affirmance of a judgment in this court or the supreme court. An appeal from the circuit court only suspends the judgment, and the affirmance of such judgment in the appellate court removes the *supersedeas* and leaves the original judgment in full force. On the other hand, an appeal from the judgment of a justice of the peace vacates the judgment, and whatever disposition is made of the case adverse to the appellant, whether it be on a trial anew, or for failure to prosecute, the judgment of the circuit court is independent and original. Therefore, the circuit courts in disposing of appeals from justices of the peace disregard all errors, omissions or imperfections in the proceedings before the justice. If the appellant in such a case fails to prosecute the appeal according to law, then it would be the duty of the circuit court to make such judgment in the case as the law requires. This should be done without regard to the form or regularity of the judgment of the justice.

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We are, therefore, of the opinion that the court did right in hearing evidence concerning the value of the property. The goods were in the hands of the defendant, and it was impossible for the court to render such judgment as the statute contemplates without such evidence. The fact that the justice had failed to find the value could not possibly relieve or prevent the court from discharging its duty under the law.

However, there is a difficulty in the record which seems to have escaped the notice of the court and counsel. The circuit court found the value of the property to be seventy-five dollars, and judgment was entered against the defendant and the surety on his appeal bond for that amount. The penalty or amount of the bond is only fifty dollars. It is quite evident that the judgment as to the surety is erroneous, and for this reason it cannot be sustained. We will, therefore, be compelled to reverse and remand the cause with directions, either to enter judgment against the defendant alone for the property or its ascertained value, or against the defendant and his surety for the property or its value in a sum not exceeding fifty dollars, as the plaintiff may elect. All the judges concurring, it is so ordered.

STATE *ex rel.* JULIUS GROSCHKE, Respondent, v. A. B. CROWDER *et al.*, Appellants.

St. Louis Court of Appeals, April 15, 1890.

Practice, Appellate: NON-PREJUDICIAL ERROR. The judgment appealed from will not be reversed by this court for non-prejudicial error.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

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Henry B. Davis and *Louis A. Steber*, for the appellants.

Lubke & Muench, for the respondent.

Biggs, J., delivered the opinion of the court.

On the twenty-ninth day of December, 1888, one Philip Becker and Huldah K., his wife, were the owners of a small grocery store on Olive street in the city of St. Louis, and on that day they transferred and delivered to the relator, Julius Groschke, the entire stock, including fixtures. At that time the defendants, Crowder and Dugger, were creditors of the Beckers. Two days after the transfer to the relator they instituted their action by attachment against Philip Becker, and, under their orders, the constable seized under the writ of attachment the stock of groceries and fixtures. The relator filed a claim with the constable under the provisions of an act of the legislature, approved March 3, 1855, entitled an "Act concerning the duties of the sheriff and marshal in the county of St. Louis in relation to the levy and sale of such property under execution or attachment, as may be claimed by third parties." Under the provisions of the same act the plaintiffs in the attachment suit executed the bond sued on herein, in which the obligors therein bound themselves to indemnify the relator for all damages sustained by him on account of the seizure and sale of the property levied upon.

The defendants' answer, among other things, contained the following: "Defendants further answering say that whatever claim or title said Groschke possessed at the time of said levy was in fraud of the creditors of said Becker, and was given to said Groschke for the purpose of hindering, delaying or defrauding the creditors of said Becker."

The case was tried on the issue thus presented, and there was a verdict and judgment for plaintiff for the

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sum of two hundred dollars. From this judgment the defendants have appealed.

There was but little conflict in the evidence, and the complaint made by the defendants pertains to the instructions. If the case was submitted to the jury under proper declarations of law, the affirmance of the judgment must necessarily follow. However, it will be necessary and requisite to a proper understanding of the instructions, and the position assumed by the defendants' counsel, to make a brief statement of the facts, as disclosed by the record, out of which this litigation has arisen.

On the twenty-eighth day of February, 1888, Philip and Huldah K. Becker executed their note to the relator for two hundred dollars, due thirty days after date. The note was given for borrowed money, and, to secure it, the Beckers executed a chattel mortgage on their household goods and the store fixtures. The fact that the money was loaned, and that the chattel mortgage was properly executed and recorded, is not controverted. The time for the payment of this note was extended at the end of each succeeding month until the twenty-eighth day of December, 1888, at which time the transfer of the stock of goods was made by the Beckers to Groschke. At the time of each such extension, Becker paid to the relator the sum of ten dollars, making a total payment of ninety dollars. They both testified that these sums were paid in consideration of additional time for the payment of the note, and were not intended as payments either of principal or interest. The relator and Becker both testified in regard to the terms and conditions of the transfer, concerning which they are not quite in accord. We gather from Groschke's testimony that he was to release his mortgage on the household furniture, and, in its place, he agreed to accept the stock of goods; that he and Becker thought that the fixtures and stock were worth about

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the amount of his debt; that thereupon the stock and fixtures were delivered to him with the understanding that he would sell the property at auction and apply the proceeds to the payment of his debt. The conclusion to be drawn from this testimony is that the stock of groceries were pledged and delivered as security for the debt, rather than as an absolute sale for a stipulated price, and that the fixtures were delivered under the mortgage to be likewise sold to liquidate the debt. Becker seems to have understood the transaction as an absolute sale. Whatever the facts may be, the law is similar, as the transfer and absolute delivery of a grossly excessive amount of property, even as a pledge to secure a debt, when made by a debtor known to be in failing circumstances, will furnish evidence that the transaction is fraudulent, as designed to hinder and delay creditors. Concerning the fixtures, we think that it is fairly inferable from the testimony of both that they were delivered under the mortgage. The plaintiff's evidence also tended to show that the amount due on the note was two hundred dollars, and that the value of the stock was about that amount, and of the fixtures sixty-five dollars.

On the foregoing state of facts, the court, at plaintiff's instance, instructed the jury as follows:

"1. The court instructs the jury that in this state an insolvent debtor has the lawful right to prefer one of his creditors by satisfying his claim in full, even though the necessary effect of so doing will be to hinder and delay any or all of his other creditors.

"2. The court instructs the jury that, if they believe from the evidence that, at the time of the transfer of the property in question from Huldah K. Becker and her husband to Julius Groschke, said Beckers, or either of them, were justly indebted to said Groschke in a debt then due; that said transfer was received by said Groschke for the sole purpose of securing to himself the

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payment of said debt, so due; and that, within a reasonable time after such sale, said Groschke took actual, open, notorious and exclusive possession of said property, and so continued until the levy made thereon by direction of defendants, Crowder and Dugger, then your finding herein must be for the plaintiff in such sum as you may find from the evidence to have been the reasonable market value of such property at the time of levy; provided such value does not exceed the then amount of said Groschke's debt, and, if such value should be found by you to exceed such debt, then your finding should be in the amount of such debt.

"3. The court further instructs the jury that, if they find from the evidence that the sums, paid monthly after the execution of the mortgage by Philip Becker to Groschke, were voluntarily paid by said Becker to said Groschke for the purpose of procuring extension of said mortgage, when overdue, and that such payments were not made by said Becker upon the principal debt secured in said mortgage, then the jury should disregard such payments in arriving at a conclusion as to the amount due Groschke from Becker on the twenty-ninth day of December, 1888.

"4. If the jury find from the evidence that the mortgage read in evidence, from Philip and Huldah K. Becker to relator Groschke, was made and delivered upon a valuable consideration between the parties and in good faith, without intent to hinder, delay or defraud the creditors of said Philip or Huldah K. Becker, and that the defendants, Crowder and Dugger, caused some of the articles in said mortgage described to be levied on, then, even if the jury find under the other instructions that the transfer of December 29, 1888, was void as to creditors of said Beckers, their finding must be in favor of the plaintiff for the reasonable market value of the goods so in said mortgage described, which you may find from the evidence were levied on, at the date of said levy."

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The defendants asked the court to instruct as follows:

"The jury are instructed that, while a debtor has the right to transfer sufficient of his property to any one of his creditors in payment of a just debt to the exclusion of his other creditors, yet such transfer must be made in good faith for that purpose only, and he will not be permitted in such disposition of his property to transfer more in value than is sufficient to pay such debt; if, therefore, the jury find that Becker transferred, under the pretense of paying Groschke, property of a value largely in excess of the debt owed Groschke, and if at the time said Groschke knew that said property was of a value largely in excess of his debt, then the jury are instructed that said transfer to said Groschke was void, and the jury will find for the defendants.

"The court instructs the jury that, if they find from the evidence that at the date of said transfer that said Becker was in a failing condition, and that for the pretended purpose of preferring Groschke he transferred all his property to said Groschke to the exclusion of his other creditors, and that said transfer was of property largely in excess in value to the amount due said Groschke, and that said Groschke knew that said property was largely in excess of said debt, and that said Groschke received said property with the intent to hinder, delay or defraud the creditors of said Becker, then the court instructs you that said transfer was void as to the creditors of said Becker."

The court refused these instructions, but in lieu of them gave the following:

"The jury are instructed that while a debtor has the right to transfer sufficient of his property to any one of his creditors in payment of a just debt, to the exclusion of his other creditors, yet such transfer must be made in good faith for that purpose only, and he will not be permitted, under the pretense of paying

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a debt, to transfer more property than is reasonably sufficient for that purpose, to the prejudice of other creditors. If, therefore, you believe from the evidence that Becker, under the pretense of paying or preferring Groschke as a creditor, transferred to him property largely exceeding in value the amount due to said Groschke with intent thereby to hinder, delay or defraud his other creditors, and that Groschke took said property with knowledge of such facts, then you are instructed that said transfer of December 29, 1888, read in evidence, was void as to said Becker's other creditors, and the plaintiff is not entitled to recover on the strength thereof. But this does not deprive the plaintiff of the right to recover on the strength of the chattel mortgage read in evidence, if under the evidence and other instructions you find any part of the property levied on was included in said mortgage."

It will be observed that the plaintiff's second instruction treated the transfer of the stock and the delivery of the possession of the fixtures as a pledge for the security of the relator's debt, and confined the recovery to the reasonable value of the property not to exceed the amount of Groschke's debt. This was certainly the most favorable view for the defendants, and, as the verdict of the jury did not exceed the amount which the relator claimed to be due on his debt, to-wit, two hundred dollars, we cannot see upon what ground the defendants can complain. If the transaction between Groschke and Becker was not fraudulent (a fact which the jury was required to find), the defendants could not have expected the court to place a more favorable limit on the amount of recovery.

The defendants next complain of the plaintiff's fourth instruction, and it is objected to on the ground that the relator's right under the mortgage was merged in the agreement of December 29, and that consequently the right of action as to the entire property

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must depend solely upon the validity of that agreement. In other words, the defendants complain because the court instructed the jury in effect that, although the finding might be against the good faith of the transaction of December 29, when the property was turned over to Groschke, yet the relator was entitled to a judgment for the reasonable value of the fixtures covered by his mortgage, provided the jury found that the mortgage was executed in good faith and for a valuable consideration. The evidence in the case fully justified this instruction. The mortgage debt was past due, and, if the mortgage was valid, the relator's title to the fixtures was complete, and it in no way depended upon the good faith of the subsequent action of the parties concerning the possession. But, aside from this, we cannot see how the defendants were prejudiced by this instruction. The jury found that the contract of December 29 was valid, and made in good faith, and, if it be conceded that the rights of the relator under the mortgage were merged in the subsequent agreement, it would not help the defendants' case in the least. If there had been a finding for the defendants as to the goods, and against them as to the fixtures, then there might be some grounds for the complaint now made.

What we have said about the plaintiff's fourth instruction disposes of the defendants' instructions. The defendants asked the court to declare that the finding must be for them as to the entire property, unless the contract of December 29 was made in good faith; thus ignoring the relator's right to a verdict for the value of the fixtures, provided the mortgage was executed in good faith and for a valuable consideration. The court's instruction, which was given instead of those asked by the defendants, supplied this defect and presented the defendants' side of the case in other respects in a very fair and favorable way.

And, lastly, the defendants complain that only one form of verdict was submitted to the jury. Just in

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what way this was prejudicial to the defendants is not made to appear. There was no evidence tending to prove that the Beckers did not owe Groschke, or that the mortgage was not executed in good faith, and we cannot see how the jury, under this state of proof, could have failed to find a verdict in favor of the plaintiff for at least the value of the fixtures. This furnishes a very good reason for the action of the court in submitting only one form of verdict.

Finding no error in the record, the judgment of the circuit court will be affirmed. All the judges concurring, it is so ordered.

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S. W. Walton, Respondent, v. Kansas City, Fort Scott & Memphis Railroad Company, Appellant.

St. Louis Court of Appeals, April 15, 1890.

1. **Practice, Appellate:** WEIGHING THE EVIDENCE. This court will not reverse a judgment at law on the ground that the verdict is in its opinion against the weight of the evidence.

2. **Evidence:** EXPERT TESTIMONY. The opinion of a witness to a matter in issue is not competent evidence, if the subject be not one which is beyond the knowledge or experience of ordinary men.

3. **Practice, Appellate:** PRESUMPTIONS. All error is presumed to have been prejudicial, unless it affirmatively appears that it was not so.

Appeal from the Webster Circuit Court.—Hon. W. I. Wallace, Judge.

Reversed and remanded.

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Wallace Pratt and *C. B. McAfee*, for the appellant.

(1) The case was tried on the special contract of plaintiff, read in evidence, although it was not pleaded in petition, and the burden is on the plaintiff to show plaintiff's negligence. *Clark v. Railroad*, 64 Mo. 448. (2) It is not shown by any witness that the damaged condition of the stock was caused by the negligent handling of the train as charged in the petition. (3) The evidence shows beyond dispute that the car was grossly overloaded by plaintiff, and that the damages were caused by this crowded condition of the car, showing conclusively plaintiff's contributory negligence. Thompson on Neg., p. 1178; *Norton v. Stone*, 86 Mo. 351; *Milburn v. Railroad*, 76 Mo. 109. (4) The court permitted Cantrell to give his opinion as an expert in answer to questions not based on the facts but on facts not in evidence at all. *Hathaway v. Ins. Co.*, 48 Vt. 335; *In re Ames' Will*, 51 Iowa, 596; *Herald v. Shing*, 45 Me. 392.

Samuel N Dickey, for the respondent.

Biggs, J., delivered the opinion of the court.

On the twenty-sixth day of November, 1888, the plaintiff delivered to the defendant a carload of cattle and hogs, to be shipped by defendant from Fordland, a station on the defendant's railroad, to Kansas City. The plaintiff brought this action, and claimed that the defendant's servants were guilty of negligence in the transportation of the stock, and that, by reason of such negligence, nine head of the cattle and twelve head of the hogs were killed, and the remainder delivered at Kansas City in a very damaged condition. The negligence complained of by the plaintiff, and which was alleged in his petition, was in effect that the defendant's servants, in running the train from Fordland to Kansas City, operated it in such a negligent

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manner as to cause the cars to frequently collide with great force, so as to throw the cattle and hogs off their feet and force them upon and against each other with great violence, and that this caused the death of nine cattle and twelve hogs, and greatly damaged the others.

The defendant's answer contained a general denial, and the further defense that the plaintiff and defendant entered into a written contract concerning the shipment of the stock, and that the plaintiff, in consideration of a reduced rate of freight, agreed that the defendant should be released from its common-law liability as a common carrier, and that its liability should be that only of a private carrier for hire; that the plaintiff assumed all the risk of injury to the animals shipped by reason of heat, suffocation or any ill effects of being crowded, or by reason of any animal being weak or unruly; and that the plaintiff was to load and unload the stock at his own risk and attend to them while on the cars. The defendant then averred that the plaintiff wrongfully and negligently overloaded the car, and that this caused the suffocation of some of the stock and the alleged injury to the others; that the plaintiff, in violation of his contract, shipped twenty-eight head of cattle and thirty-one head of hogs in the car, and that this mixture of the two kinds of stock contributed directly to the loss.

To this answer the plaintiff filed a replication, and, on the issues thus framed, the case was tried and submitted to a jury. There was a verdict and judgment for the plaintiff for two hundred dollars.

The defendant has assigned various reasons for reversal of the judgment, but we deem it necessary to discuss only two propositions or questions presented by the record:

First. At the close of the evidence the defendant asked the court to give the following instruction: "There is no sufficient evidence proving defendant guilty of the

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carelessness and neglect charged in the petition and you will find the issues for the defendant." The court refused to give this instruction, and the defendant assigns this for error.

Second. On the trial the plaintiff introduced J. P. Cantrell, as a witness, and during his examination the plaintiff's counsel asked him the following question:

"*Q.* If a carload of cattle and hogs are loaded at Diggins and stay there half an hour and were taken from there to Humansville, eighty-four miles, and be in good condition at Humansville, and in the next thirty-seven miles they were all down and piled up in the car, what in your opinion would be the cause of their bad condition? *A.* I would guess they were jerked down and tangled up."

The defendant objected and excepted to this question and answer.

I. The general rule is that, if there is any substantial evidence to support a judgment, an appellate court will not interfere. The statement of this rule is very simple, but its practical application is often quite difficult. We have given the record in this case a critical and careful reading, and, while it is undoubtedly true that the affirmative testimony of the persons in charge of the train tended strongly to show that they exercised due care in the discharge of their respective duties and that the injuries to plaintiff's animals were caused by overloading, yet the circumstances connected with the transportation of the stock, when coupled with the testimony of the plaintiff's agent (who had them in charge) as to the way the train was managed, furnished substantial evidence of the averments of the petition.

It is eighty-four miles from the station where the stock was loaded to Humansville, another station on the defendant's road, and it is thirty-seven miles from Humansville to Deepwater. The evidence of both parties tended to prove that the animals were transported

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with safety to Humansville, and that, when the train arrived at Deepwater, it was ascertained that nine of the cattle and twelve of the hogs were dead and the others very greatly injured. The stock was in such a bad condition, that the defendant's employes detached the car and left it on the sidetrack at Deepwater. The dead animals were removed from the car, and the others sent forward to Kansas City the next day. Samuel Trimble had the plaintiff's stock in charge, and his testimony concerning the management of the train from Humansville to Deepwater was as follows: "The train stopped a number of times. I supposed when it started it would go until it slowed to a stop and then back. I could hear cars back and hit the caboose, then they put the brakes on the caboose, then start up and pull again. I can't tell how often. The jarring would sometimes shake a man up pretty lively in the caboose. Whenever they would start, they would seem to jerk up with the same force as when it came back. I cannot say how often this occurred; it was half a dozen times as well as I recollect on two hills; might have been that often each time as near as I recollect. I can't tell the length of these hills. When they would stop and start, they would sometimes go a very short distance; can't say how far. As compared with ordinary stops, their stops and starts were harder.

"*Q* Have you shipped a great deal of stock? *A*. A right smart. I traveled with them.

"*Q*. Is your knowledge sufficient to inform you what causes cattle to get down in cars? *A*. I don't know that I have sufficient information to answer. After leaving Humansville I next saw the cattle at Deepwater. Then they were nearly all down, and a good many dead. I don't know how many were piled up on one another, and across each other every way; the dead ones in the center of the car. They switched the car out at the cattle chute, and left it there. The railroad men gave

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it in charge of the section men. Me and the railroad men tried to unload, and got a dead one out by hitching a chain to a cow and post and pulling out with the engine and they said the car would have to be unloaded, and they would leave it and go. This car was the second car from the engine.

"*Q.* State the length of time intervening after rushing the cars back until the engine jerked them forward again? *A.* Rushed forward and rushed back at once, almost together.

"*Q.* State if these jars were strong enough to knock a man off his feet without holding to something. (Objected to as improper, incompetent and immaterial.) By court: You may answer if you know of your own knowledge. *A.* If a man had not been expecting and not on his guard, it would have been hard enough. (This answer objected to as incompetent and immaterial. Objection overruled, and defendant excepted.)

"*Q.* You stated that these jars were greater than common; just explain the rapidity of them. (Objected to.) By court: If you can explain, answer. *A.* I don't know that I can; it seems that, when they stopped, all the slack would be made back to the caboose, and then they would start up again. I saw the condition of the cattle at Deepwater."

That the animals were transported to Humansville, a distance of eighty-four miles, without serious injury, and that, in running from Humansville to Deepwater, a distance of thirty-seven miles, about one-third of the animals were killed, and the others were badly injured, are physical facts strongly tending to support the plaintiff's case, and are corroborative of Trimble's testimony. This state of the proof would be satisfactory and quite sufficient to establish the averments that the injuries to the plaintiff's property were directly attributable to the negligence of the defendant's servants, if there had been no proof of misconduct by plaintiff

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in overloading the car. The evidence on this point was somewhat conflicting, but the preponderance was against the plaintiff, and was to the effect that the car was overloaded, and that the negligence of the plaintiff in this respect contributed directly to the injury. But, notwithstanding this, we cannot disturb the judgment, although the verdict of the jury may, in our opinion, have been against the weight of the evidence. We will, therefore, rule the first assignment against the defendant.

II. That the question propounded to the witness Cantrell and his answer thereto were objectionable, there can be no doubt. The opinion of witnesses on the substance of an issue should never be resorted to, except when the subject is one beyond the knowledge or experience of ordinary men. It is only in such cases that expert testimony has any value, for the reason that it is merely advisory in its character. In this matter, why should the judgment of Cantrell be substituted for that of the jury. His opinion or "*guess*" on the subject could be no better than that of any intelligent member of the jury.

It only remains for us to determine whether this objectionable testimony was prejudicial. The general rule is that all error is presumed to be prejudicial, and it devolves on the party claiming the benefit of the judgment to satisfy the appellate court that the error was not prejudicial. *Clark v. Fairley*, 30 Mo. App. 335. If the proof in this case, outside of this objectionable testimony, was such as to make the plaintiff's right of recovery reasonably certain, then we might assume that the jury, in arriving at the verdict, was not influenced by the opinion of Cantrell, and that, if the judgment was reversed, a retrial of the case would likely result in the same way. But the record will not admit of this; we cannot say that the jury was not influenced by this evidence, but we would be justified in a conclusion diametrically opposed to this.

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We think that the ends of justice require a retrial of this case, and we will, therefore, reverse the judgment and remand the cause. In other respects the court is of opinion that the case was fairly tried. It is ordered that the judgment be reversed and the cause remanded. All the judges concur.

J. B. C. LUCAS, Respondent, v. JOHN F. FALLON *et al.*, Appellants. 40 551 60 576

St. Louis Court of Appeals, April 15, 1890. 40 551 78 127

1. **Forcible Entry and Detainer:** AMENDMENT. The circuit court, on appeal from the judgment of a justice of the peace in an action of unlawful detainer, may allow an amendment of the complaint, increasing the claim for damages.

2. ——: NEW BOND. Circumstances considered, and an order in the circuit court requiring additional bond *held* erroneous in requiring such bond for an excessive amount.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

REVERSED AND REMANDED.

T. J. Rowe, for the appellants.

Lee & Ellis and *Montague Lyon*, for respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action of unlawful detainer. The plaintiff had a judgment in the justice's court for restitution, and seven hundred and seventy dollars for monthly rents and profits and seven hundred and sixty dollars' damages. The defendant appealed to the circuit court and gave an appeal bond in the sum of sixteen hundred dollars.

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The original complaint before the justice laid the damages for the detention of the premises at the sum of one hundred dollars, and claimed one hundred and fifty dollars as the monthly rents and profits. In the circuit court the plaintiff was permitted to amend his complaint by increasing the damages to the sum of one thousand dollars, leaving his claim for rents and profits the same as before. On motion of the plaintiff, the circuit court made a rule on the defendants to give a new appeal bond in the penal sum of four thousand dollars. This ruling was made on a motion, grounded on the allegation that the original appeal bond had become insufficient in amount. The defendants failed to give the new bond within the time prescribed by the order of the court, and their appeal, therefore, was dismissed, which resulted in leaving the justice's judgment in force.

I. The first assignment of error is that the circuit court erred in allowing the plaintiff to amend his complaint, as above stated, and also that it erred in allowing the amendment to be made unconditionally. We are of opinion that, on an appeal from the justice of the peace, in an unlawful detainer case, the circuit court may allow the complaint to be amended by increasing the damages, and have so decided in *Elliott v. Abell*, 39 Mo. App. 346, at the last term. The statute fixes no limit to the amount of damages which may be laid in a complaint of forcible entry and detainer or unlawful detainer, and, therefore, the court had a discretion to allow this amendment; nor does the record present anything which indicates that the discretion was abused in this instance, because the amendment was not allowed upon terms.

II. The next assignment of error is that the court erred in ordering the defendants to give the new and additional appeal bond in the sum of four thousand dollars, as above stated, and erred in dismissing their

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appeal because of their failure to give it. It is not questioned that the court had power to order them to give it (Revised Statutes, 1879, section 2486), or to dismiss the appeal for the failure to give it (section 2488); but the argument is that the discretion was abused in this instance, in exacting a bond in so large an amount. The action was commenced February 12, 1889. The justice's judgment was rendered April 17, 1889, and was, upon its face, wholly unauthorized in amount and flagrantly excessive. The order to give the new appeal bond was made on July 3, 1889. The order dismissing the appeal was made on July 16, 1889. The monthly rents and profits laid in the complaint were one hundred and fifty dollars, and the effect of dismissing the appeal was to subject the defendant to a judgment of three thousand and seventy dollars up to that date, running with an increase of seven hundred and seventy dollars per month, when, according to the plaintiff's own claim before the justice and in the circuit court, he was entitled only to one thousand dollars, running with an increase of three hundred dollars per month, at the outside. It is clear that the cause could have been tried before enough rents and profits could have accumulated, in addition to the amount of the damages laid in the amended complaint, to render necessary so large a bond, especially in view of the rule in *Walter v. McSherry*, 21 Mo. 76, that the new bond in such a case is cumulative, and does not discharge the old one. The order thus imposed on the defendants, the necessity of furnishing sureties to the aggregate amount of fifty-six hundred dollars, or else of going out of court without a trial and submitting to the wholly unwarranted judgment of the justice. Assuming that, in the state of the docket of the circuit court, the cause could not be reached and tried before the October term, and that a delay of ten months might, therefore, elapse before restitution,—still, it

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would seem that an additional bond in the sum of twenty-five hundred dollars would have been amply sufficient to cover all prospective damages and rents and profits, although doubled under the statute. We think the case, under its peculiar facts, shows that the court exercised its discretion unsoundly, in dismissing the appeal for failure to give the additional bond in the sum demanded.

The judgment will be reversed and the cause remanded. All the judges concur.

WILLIAM S. LOWRY, Respondent, v. THE ST. LOUIS AND HANNIBAL RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, April 15, 1890.

1. **Railroads:** VIOLATION OF MUNICIPAL ORDINANCE: PROXIMATE CAUSE OF INJURY. The violation of a municipal ordinance regulating the rate of speed of railroad trains, while negligence *per se*, affords no ground for an action for damages, unless it is the proximate cause of the injury complained of.

2. **Negligence:** INJURY TO STOCK WITHOUT COLLISION. In an action for injury to stock by a railroad there may be a recovery without any actual collision, if the action be one at common law, though it is otherwise, when the action is one for double damages under the statute. But there is a wide difference between the case of an actual collision and one where there is none, in respect to the inquiry, whether negligence in running the railroad train at an excessive rate of speed in violation of a municipal ordinance was the proximate cause of the injury.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED.

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Theo. G. Casey and *Jas. H. Orr*, for the appellant.

The burden of proof was upon the plaintiff to establish by evidence the negligence charged, and that the alleged negligence caused the injury complained of. *Randall v. Railroad*, 65 Mo. 325; *Fitz v. Railroad*, 45 Mo. 322; *Stepp v. Railroad*, 85 Mo. 231; *Wallace v. Railroad*, 74 Mo. 594. The evidence indisputably shows that the train came to a complete standstill seventy-five yards away from the mules, and that the mules thereafter ran into the trestle and were crippled or killed. There was no evidence whatever tending to show that the mules were more frightened by the train going at the rate of twelve miles an hour than that they were frightened by it standing still, or that they were frightened at all by the train when it was going at the rate of twelve miles an hour. And there is no evidence connecting the injury complained of in the slightest manner with the negligence charged. We further insist that the law of Missouri of 1885, page 92, was a natural consequence of the decisions of this court, and of the supreme court, that a railroad company was not liable for damages for injuries to an animal which, having got upon a railroad track, ran from fright into a trestle or bridge and was injured without being struck by train, unless the fright was caused by the wilful negligence of the defendant. The plaintiff in this case, having before the circuit court abandoned that count of his statement based upon the law of 1885, is not entitled to a verdict upon the evidence from any view of this case, as there is absolutely no evidence of any wilful or malicious act upon the part of the employes of the company in charge of the train. Laws of 1885, p. 92; *Foster v. Railroad*, 90 Mo. 116; *Sloop v. Railroad*, 22 Mo. App. 592; *Swearingen v. Railroad*, 64 Mo. 73; *Railroad v. Haskett*, 10 Ind. 409; 1 Rorer on Railroads, sec. 12, p. 704.

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I. C. Dempsey and *J. D. Hostetter*, for the respondent.

It is true that the authorities cited hold that no recovery can be had under double-damage act, section 809, Revised Statutes, 1879, without proof of actual collision or contact between the train and the animals injured. But it has been distinctly held that a defendant railway company is liable in a common-law action for negligence or for failure to comply with a statutory duty; even though the injury happened without contact with the animals by the train. *Boggs v. Railroad*, 18 Mo. App. 274, 278.

THOMPSON, J., delivered the opinion of the court.

This was an action for damages for killing two mules belonging to the plaintiff. The action was commenced before a justice of the peace on a statement containing two counts. In the circuit court an amended statement was filed likewise containing two counts. By the instructions of the court the case was submitted to the jury on the second count only. This count predicated a right of recovery upon the facts that the mules got upon the defendant's track within the limits of the incorporated town of Bowling Green; that the defendant's train was running at a rate of speed prohibited by an ordinance of the town; and that the mules were frightened by the negligent and unnecessary use of the steam whistle of the defendant,—by reason of which they ran into a bridge, and were so injured that it became necessary to kill them. The court submitted the case to the jury on two instructions, one of which told them that the defendant was liable, if the mules were frightened into the bridge by reason of the negligent and unnecessary sound of the steam whistle; while the other told them that the defendant was liable, if the mules were frightened into the bridge by reason

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of the defendant's train being run at a greater rate of speed than five miles an hour, the limit prescribed by the city ordinance.

We have examined the record with care. We lay all other questions out of view, and place our decision on the ground that there was no evidence of negligence to go to the jury, such as they were entitled to consider as the proximate cause of the accident. The evidence shows that the mules were young mules,—yearlings; that they had escaped from the plaintiff's close, two miles and a half from the place where the injury took place; that it took place in the night time, within the corporate limits of the town of Bowling Green, and near the depot grounds of the defendant, at the place where the defendant's road crosses the Chicago & Alton railroad. There was a herd of mules,—how many is not stated. Some of them ran upon the track at or near a street crossing, while the train was approaching at the rate of from ten to fifteen miles an hour, in the opinion of the witnesses, who are not shown to be experts, or to be qualified to express an opinion on the subject. The mules ran along the track from the train in a "bunch." The headlight of the train shone upon them. The engineer commenced whistling,—"a kind of curious noise." Some steam was also blown off, but not much. The train gained on the mules, but stopped within seventy-five yards, or, as one of the witnesses stated, six or seven lengths, meaning lengths of the train, from the bridge. The mules that were injured were not struck by the train, but were injured in consequence of running into the trestle work of the bridge. There is no evidence that the employes of the defendant in charge of the train did not do all that they could to stop the train and to frighten the mules from the track. One witness gave it as his opinion that "what frightened the mules most was the tooting." But, although this evidence was not

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objected to, it was a conclusion which it was for the jury, and not for the witness, to draw, and it cannot be regarded as having any probative force.

We are then left to consider whether the fact, that the train was running at a rate of speed prohibited by the city ordinances, could be regarded as the proximate cause of the accident. The mules evidently saw the headlight and heard the noise, and ran, as they naturally would, in the opposite direction. There is not a particle of evidence tending to show that they would not have been equally frightened, if the train had been running at a rate of speed of not more than five miles an hour. It has been often held that the violation of a valid municipal ordinance, regulating the speed of railway trains, is negligence *per se;* but it, nevertheless, affords no ground of action for damages, unless it is the proximate cause of the injury complained of. Collateral violations of ordinances are to be redressed, if at all, in an action by the municipality whose laws are offended.

This case is quite distinguishable in its facts from similar cases, where the animals are struck by the train. We deem it proper to say, in this connection, that we do not concur in the view taken by the learned counsel for the appellant, that there can be no recovery in a common-law action grounded upon negligence, unless there is an actual collision between the train and the animals on the track. That there can be no recovery where there is no such actual collision is the settled construction of our statute giving double damages. R. S. 1879, sec. 809. And while there is an inadvertent expression in one case, which was a common-law action for negligence, which seems to have conceded the same principle in respect of such actions (*Halferty v. Railroad*, 82 Mo. 90, 97), yet it is obvious, on a little reflection, that there is no principle of the common law, in conformity with which this can be held; and Judge

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ELLISON was no doubt right in so saying in the case of *Boggs v. Railroad*, 18 Mo. App. 274, 278. Counsel are no doubt right in the view that this construction of the double-damage act induced the passage by the legislature of the act of 1885 (Laws of 1885, page 91) under which the first count of the amended petition (abandoned at the trial) was drawn.

But in respect of what constitutes the proximate cause of the injury, there is a wide distinction between the case where the animals are actually struck by the train, and where it comes to a full stop within seventy-five yards of them. In the former case it might be fairly a question for the jury whether, if the train had been going at a less rate of speed, the animals would not have cleared the track without being struck. But there is no suggestion of human experience, upon which it can be said that a herd of young mules in a new and strange situation, frightened by the noise and headlight of an approaching train in the night time, would not be as apt to huddle together in a bunch and run along the track away from the train, if it were coming slowly, as they would if it were coming more rapidly.

The judgment will be reversed. Judge ROMBAUER concurs; Judge BIGGS takes no part in this decision.

L. DYER *et al.*, Respondents, v. H. E. BALSLEY, Defendant; T. P. BAILEY, Interpleader, Appellant.

St. Louis Court of Appeals, April 15, 1890.

1. **Sales:** DELIVERY AS AGAINST CREDITORS OF THE VENDOR. A mere symbolical delivery of personal property, without any outward or visible change of possession within a reasonable time, such as the nature and situation of the property admit of, will not constitute such a change of possession as the statute requires, as

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against creditors of the vendor, especially when the vendor continues to sustain the same relation to the property in respect to its possession as before the sale.

2. ——— : ———. But the delivery is sufficient to satisfy the requirements of the statute, though the property sold remains in the building in which it was, if such building was until the time of sale the dwelling of the vendor, and if, at said time, the vendor not only delivers to the vendee a bill of parcels together with the key to the building, but also at once removes with his family from such building, and entirely divests himself of the possession thereof, surrendering the same to the vendee, who openly takes the exclusive possession of the premises.

Appeal from the Greene Circuit Court.—Hon. W. D. Hubbard, Judge.

Reversed and remanded.

Thrasher, White & McCammon, for the appellant.

F. S. Heffernan and *Murray Bros.*, for the respondents.

Thompson, J., delivered the opinion of the court.

This action was commenced before a justice of the peace by the plaintiff against the defendant Balsley. In this action Bailey filed an interplea, claiming to be the owner of four articles of personalty, levied upon by the constable, namely, one sofa, one rocker, one bedstead and one stand table. On trial anew in the circuit court, the court instructed the jury to find for the plaintiff on the issue made by the interplea. They so found, judgment was accordingly entered, and the interpleader appeals to this court.

The case seems to have turned entirely on the question whether there had been such an open, notorious and visible change of possession, as the statute (Revised Statutes, 1879, section 2505) requires, to make a sale of chattels good as against creditors of the vendor. There was no dispute in the evidence. It showed that, in the

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year 1886, the interpleader was in partnership in the furniture business with one Gilmore; that Gilmore and Bailey sold these goods to Balsley, the defendant in the attachment suit, on a credit; that Balsley, not having paid for them, they were, under some arrangement, some time in January, 1888, taken back *by Gilmore* for what remained due of the purchase money; that the goods were in a house in which Balsley was residing with his family; that Balsley gave Gilmore a list of the goods and a bill of sale, and, also, the key to the house, and told Gilmore to go and get them; that, on the following day, Balsley and family moved out of the house and left the state; that Gilmore, two or three days after he purchased the goods from Balsley, sold them to Bailey, and delivered the key of Balsley's house to him. This transaction took place in the store of Gilmore. It was a part of a transaction, by which a large lot of goods was sold and turned over by Gilmore to Bailey. The bill of sale from Gilmore to Bailey was dated January 14, and the goods were levied upon by the constable under the attachment against Balsley on January 18. This bill of sale included other articles of furniture, besides those for which Bailey has interpleaded, namely, a sewing machine, four cane chairs and an extension table. These other articles Bailey removed from Balsley's house to the store. The court refused to allow him to state why he did not take the others. Although he excepted to this ruling, he did not make any tender of evidence, so as to make it appear that his reasons for not doing so would have been at all material. Bailey went to Balsley's house the day before he took these goods to the store, to assure himself that the goods were all there, and he found that they were. There was no person in the house. The doors in the main portions of the house were all locked. Some of those in the back part were without locks, but were barred from the inside. The

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constable, in making the levy, entered through a window.

Where there is no dispute about the facts, and they are of unequivocal import—such that fair-minded men could not draw different inferences from them—the question, whether there has been such a change of possession as satisfies the statute, is to be declared by the court. *Leeser v. Boeckhoff*, 33 Mo. App. 233. And, where it appears from the undisputed evidence that the change of possession was not such as the statute requires, the court should, as matter of law, declare the sale fraudulent. *Knoop v. Nelson Distilling Co.*, 26 Mo. App. 303; *Wright v. McCormick*, 67 Mo. 426; *Stewart v. Nelson*, 79 Mo. 524. In *Harmon v. Morris*, 28 Mo. App. 330, speaking with reference to a case where the property was movable, and easily susceptible of a visible change of possession, PHILIPS, J., said: "There must be an actual delivery, a substantial change of possession. No symbolical delivery will suffice as against third parties." In this view we concur, but it is not applicable to the case before us; for there the property, which was the subject of the controversy, was merely exhibited to the alleged vendee for identification, and then taken back by the vendor, and used by him as before. So, in *Wright v. McCormick*, 67 Mo. 426, where the subject of the alleged sale was a retail cigar store, and the delivery consisted of the delivery of a key of the store, there was no visible change of possession whatever; the store was kept open as usual; the same sign remained, and, after the sale, and before the attachment, the alleged vendor was frequently at the store, and participated in selling goods. In *Stewart v. Nelson*, 79 Mo. 524, the subject of the controversy was a lot of railway ties, and the evidence showed that, after the alleged sale, Bergstrom, the vendee, put a red dot on each of the ties, but it also appeared that the ties were left in possession of Aspland, a partner of Nelson, the same as before,

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Aspland and Nelson being the debtors in the attachment suit, and the alleged vendors of the ties to Bergstrom, the interpleader. See, also, the facts which were the subject of consideration in *State to use v. King*, 44 Mo. 238, and *State to use v. Johnson*, 1 Mo. App. 219.

It may be collected from these authorities that a mere symbolical delivery of personal property, without any outward or visible change of possession within a reasonable time, such as the nature and situation of the property admit of, will not constitute such a change of possession as the statute requires, especially where the alleged vendor continues to sustain the same relation to the property in respect of its possession as before. The reason is that such a delivery of possession, although good between the parties, in no manner apprises the public that a transfer of title has taken place, but presents the case of a shuffling or concurrent possession, so productive of those frauds upon creditors and purchasers, against which the statute was leveled.

But the case before us does not fall within the principle of these decisions at all. Here Balsley, the vendor, delivered to Gilmore a bill of parcels, and, also, the key of the house, and afterwards left the house with his family, and thus divested himself of the possession, and placed Gilmore in the possession, as completely as the nature of the case admitted of, without Gilmore removing the articles of furniture from the house to his own store. Thereafter, there was no concurrent, shuffling or doubtful possession. The abandonment of the house by Balsley must have been an open and public occurrence, and the public were no doubt apprised of the fact. Gilmore's possession having thus become complete, open and exclusive, and Balsley's possession having become completely divested, it is immaterial to inquire whether Bailey, Gilmore's vendee, had or had not time to remove from the house

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the articles which were levied upon, since, as against Balsley, he had the same possession as Gilmore had.

This case, it seems to us, is quite distinguishable from the case which would have been presented if the house in which the articles were stored had been vacant at the time of the sale from Balsley to Gilmore. In that case the change of possession by the delivery of the key would have been symbolical merely, and nothing would have occurred to apprise the public of it. Whether, in that case, there would have been such a change of possession as satisfies the statute, we need not speculate; because the fact of Balsley's abandoning the house with his family, after the sale to Gilmore, and shutting the house up, was a divestiture of his possession sufficiently complete and public to satisfy the demands of the statute; and the delivery of the key to Gilmore placed the goods within his exclusive dominion and control.

The judgment will be reversed, and the cause remanded. All the judges concur.

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JACOB LIPPMAN, Appellant, v. R. J. CAMPBELL *et al.*, Respondents.

St. Louis Court of Appeals, April 15, 1890.

Judgment: RES ADJUDICATA. The estoppel of a judgment binds not only the parties to it, but also their privies. And where an alleged chattel mortgage stands in the name of an agent of its real owner, and proceedings for its enforcement by an action of replevin for property which it purports to convey are taken by and in the name of such agent, an adjudication against the claims thus advanced is binding upon the principal, and may be invoked as *res adjudicata* against such principal by persons to whom such property was subsequently transferred by the defendant in such action in replevin.

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Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

R. F. Butts, for the appellant.

(1) A married woman has the right to convey her separate property without her husband joining. *Blair v. Railroad*, 89 Mo. 390, 391. (2) If the mortgagor does not have possession of the property mortgaged at the time of sale, the purchasers are not protected, even though the mortgage is not recorded. R. S. 1889, sec. 5176. (3) Said section 5176, being remedial, should be construed equitably according to its intent and spirit, to protect honesty and not to uphold chicanery. *State ex rel. v. Emerson*, 39 Mo. 89; 1 Kent. [8 Ed.] page 514. (4) The possession of the agent is the possession of the principal. 1 Parsons on Contracts [6 Ed.] p. 40. (5) When the facts are disputed the case should be submitted to the jury under proper instructions. *Charles v. Patch*, 87 Mo. 450.

Campbell & Patterson, for the respondents.

(1) The mortgage by a married woman without the joinder of the husband, of her separate estate in personalty, is void at law. *Kimball v. Silvers*, 22 Mo. App. 520. (2) A mortgage of goods not recorded, and of which the mortgagor retained the possession, is a nullity as against a purchaser from such mortgagor in possession, even though the purchaser knew of the mortgage. R. S. 1879, secs. 2503, 5176; *Rawlings v. Bean*, 80 Mo. 614. (3) In order to pass title to the vendee it is not necessary that the vendor should be in possession. The sale may be good though the property is in the possession of a third party. *Erwin v. Arthur*, 61 Mo. 386. The possession of a bailee or agent then becomes that of

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the purchaser. *State to use v. Fitzpatrick*, 64 Mo. 185; *Glass v. Gelvin*, 80 Mo. 297; *State v. Hope*, 88 Mo. 430; *McMahill v. Walker*, 22 Mo. App. 170; *Renshaw v. Lloyd*, 50 Mo. 368; *Prior v. Scott*, 87 Mo. 303.

THOMPSON, J., delivered the opinion of the court.

This was an action of replevin for a piano, commenced before a justice of the peace. On trial anew in the circuit court the defendant had a judgment, and the plaintiff appeals to this court. The parties have agreed upon the following abstract of the bill of exceptions:

"On the trial of this cause plaintiff, to sustain the issues on his part, offered evidence tending to prove that Mary Morrow, on the fifteenth day of August, 1888, bought this piano from D. Lippman to be her own separate property. That said Mary Morrow gave her several promissory notes, payable to the said D. Lippman, or order, and a chattel mortgage conveying the piano in controversy, a Jas. M. Strarr piano, number 6073, to D. Lippman, to secure the payment of the aforesaid notes. That said chattel mortgage was conditioned that, in case any of the notes became due and were not paid, or if the mortgagor sold or attempted to sell said piano, or if the mortgagee or his assigns should at any time deem themselves insecure, then in any of those events the mortgagee, or his assigns, could take possession of said piano. That said notes had been assigned to Jacob Lippman. That three of said notes had been paid, and twenty dollars indorsed on another of said notes. That two of said notes were due when this suit was brought, and had not been paid (which evidence was admitted over the objections of the defendants, to-wit: That the chattel mortgage was not executed by Mary Morrow, was not acknowledged by her, and was never recorded, and that the same was, as to these defendants, inadmissible, irrelevant, incompetent and immaterial). That the mortgagor had sold the

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piano to R. G. Campbell and M. F. Patterson. That D. Lippman was the agent of Jacob Lippman for the collection of these notes (heretofore offered in evidence), at the time of the sale of the piano mortgaged, and the piano was in his possession under his bond as plaintiff in suit D. Lippman *v.* Mary Morrow. That it was thereby in the possession of Jacob Lippman, and was stored at the house of Thomas Bennett, Jr., the son-in-law of said Jacob Lippman. That, at the time this suit in replevin was brought, the piano in controversy was in the possession of the defendants, at the house of Robert G. Campbell, on Jefferson street, in the city of Springfield, Missouri. That the defendants were the attorneys for Mary Morrow in all suits pertaining to the piano in controversy with her.

"The defendants to sustain the issues on their part offered evidence tending to prove that D. Lippman was not the agent of Jacob Lippman for the collection of the notes which the piano was conveyed to secure. That Mary Morrow did not execute the chattel mortgage conveying the piano in controversy. That said chattel mortgage was never acknowledged or recorded. That Mary Morrow conveyed the piano in controversy to the defendants. That D. Lippman brought a suit against Mary Morrow and husband, in replevin for the piano in controversy, and that he swore he was entitled to the possession of said piano. That Jacob Lippman never got possession of the piano by that suit. That said suit was determined adversely to said D. Lippman. That an execution was issued ordering the constable to collect the judgment in the case of D. Lippman *v.* Mary Morrow from D. Lippman and his surety, or return the piano to the defendants, at their option. That the defendants, Mary Morrow and husband, elected to take the piano. That Mary Morrow and husband gave an order to the constable, directing him to deliver the said piano to Robert G. Campbell and M. F. Patterson. That said piano was so delivered."

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The above was all the evidence offered.

The plaintiff asked, and the court refused, the following instruction:

"The court instructs the jury that, if they shall find from the evidence that, at the time the defendants in this cause of action bought the piano in controversy, said piano was in the possession of D. Lippman, if they shall further find that at that time D. Lippman was the agent of Jacob Lippman for the collection of the notes secured by the chattel mortgage, under which plaintiff claims the piano in controversy, then they will find for the plaintiff and render a proper verdict in his favor."

Thereupon, the court, at the request of the defendants, instructed the jury to find for the defendants.

The plaintiff assigns for error the refusing of the instruction offered by him, and the giving of that offered by the defendants.

We do not see any error in refusing the instruction offered by the plaintiff. If D. Lippman, to whom the notes were originally made, and to whom the alleged chattel mortgage was given, was not the beneficial owner of the notes at the time he prosecuted the former replevin suit, but was merely the agent of the present plaintiff Jacob Lippman, then Jacob Lippman was bound by the judgment which was rendered against D. Lippman. If Mrs. Morrow had not sold the piano to these defendants, but had remained the owner of it, when the judgment in that action was recovered, the constable would have been bound, as against this plaintiff Jacob Lippman, to deliver the piano to Morrow and wife, the defendants in the action; and Jacob Lippman, having litigated his right to the possession of it, through his agent, D. Lippman, could not have vexed them with another action for its possession. If he could not have maintained another action against them on the same title, which had been previously litigated with them in the suit brought against them by his agent, D. Lippman,

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he could not maintain such an action against their vendees, these defendants. The constable, under the execution in that action took possession of the piano for Morrow and wife, the defendants therein. They had the right to direct him to deliver the possession to these defendants, their vendees. He properly obeyed that direction. This placed these defendants in precisely the same position, in respect of title to the chattel, which Morrow and wife would have occupied, if it had been delivered to them. The estoppel of a judgment binds the parties to the action and also their privies. The plaintiff's title to the piano had been litigated as to Morrow and wife, in the action prosecuted by D. Lippman, presumptively as trustee of an express trust for the benefit of Jacob Lippman, and it cannot be again litigated in an action against these defendants, who are the vendees and consequently the privies of Morrow and wife.

For these reasons it is also apparent that the court committed no error in directing the jury to find for the defendants. The plaintiff was estopped, by the uncontradicted evidence, from prosecuting this action, and there was nothing for the jury to pass upon.

Judgment affirmed. All the judges concur.

Frederick Sessions, Appellant, v. David Block *et al.*, Respondents. 49 569 / 62 455

St. Louis Court of Appeals, April 15, 1890.

Principal and Agent: ELECTION OF REMEDY. A person who enters into a contract with the agent of an undisclosed principal may, after the disclosure of the principal, proceed against either the principal or the agent under the contract, but not against both; and, if after such disclosure, he proceeds against one, though

unsuccessfully, he cannot thereafter proceed against the other. *Held*, accordingly, that recovery of judgment against the agent in a suit instituted after the disclosure of the principal, though the plaintiff was unable to collect it, was a bar to a subsequent suit against the principal.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

J. R. Myers, for the appellant.

(1) An agent and his undisclosed principal are each severally and equally liable. (2) Before a party can be held to have made an election, he must know all the facts, and with freedom of choice elect to charge the agent or principal, or by his acts and conduct lead the principal to think he is not looked to for payment, and, acting under such belief, change the status of his accounts with the agent. (3) A judgment against an agent without satisfaction is no bar to an action against the principal. (4) The defendants (principals) were dismissed at the trial, hence the judgment is between different parties, and no bar to this action. Meacham on Agency, sec. 699; Story on Agency, secs. 295, 449; *Ketchum v. Verdell*, 42 Ga. 538; *Beymer v. Bonsall*, 72 Pa. St. 298; *Middleton v. Railroad*, 62 Mo. 579.

John D. Davis and *Albert Arnstein*, for respondents.

The doctrine of election between remedies is generally applied in cases where a party deals with the agent of an undisclosed principal and gives credit to the agent as a principal. He is at liberty, on discovering the principal, to elect either to hold the agent or the principal; but he cannot hold both. Pollock on Contracts [4 Ed.] p. 102; Addison on Contracts [8 Ed.] p. 46; *Ames, etc., Co. v. Tucker*, 8 Mo. App. 95; *Schepflin v. Dessar*, 20 Mo. App 573; *Addison v. Gandasequi*, 3 Smith's Lead. Cas. [9 Ed.] pp. 1634, 1641; *Jones v.*

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Ins Co., 14 Conn. 501-508; *French v. Price*, 24 Pick. 13-22; *Violet v. Powell's Adm'r*, 10 B. Mon. 347; *Hyde v. Paige*, 9 Barb. 150. The creditor has an election to sue either the agent or the principal; but he cannot, after he has sued the one to judgment, maintain another action against the other. *Priestly v. Fernie*, 34 L. J. Ex. (N. S.) 172; Pollock on Contracts [4 Ed.] p. 102; Addison on Contracts [8 Ed.] bottom p. 88, star p. 46; Smith's Leading Cases [9 Ed.] note, p. 1659; *Kingley v. Davis*, 104 Mass. 177; *Raymond v. Crown, etc., Mills*, 2 Metc. 319; *Silver v. Jordan*, 136 Mass. 319; *Kendall v. Hamilton*, 4 App. Cas. 504-514; *Scarf v. Jardine*, 7 App. Cas. 345; *Tuthill v. Wilson*, 90 N. Y. 423-428.

THOMPSON, J., delivered the opinion of the court.

The court sustained a demurrer to the plaintiff's second amended petition, and he appeals to this court. The essential facts are that the plaintiff did work for the agent of an undisclosed principal; that, after discovering the principal, the plaintiff brought an action against both the agent and the principal; that, at the trial of this action, the court required him to elect whether he would proceed against the agent or the principal, and he thereupon elected to proceed against the agent; that a judgment was thereupon rendered in his favor against the agent; that he cannot collect his judgment by reason of the fact that the agent is insolvent; and that he, therefore, brings this action against the principal.

We think that this demurrer was rightly sustained. The governing principle is, that a party who enters into a contract with the agent of an undisclosed principal, may, after the principal has been disclosed, proceed either against the agent or against the principal; but he cannot proceed against both, and if he proceeds against one, although unsuccessfully, he cannot thereafter proceed against the other. *Priestly v. Fernie*, 34

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L. J. (Ex.) 172; *Kendall v. Hamilton*, 4 App. Cas. 514; *Kingley v. Davis*, 104 Mass. 179. Thus, if after the principal has been disclosed to him, he accepts in settlement the note of the agent, he thereby discharges the principal. *Paige v. Stone*, 10 Met. (Mass.) 160; s. c., 43 Am. Dec. 420; *Henry Ames, etc., Co. v. Tucker*, 8 Mo. App.. 95; *Schepflin v. Dessar*, 20 Mo. App. 569. It is of course immaterial in what way the creditor makes his election, whether by taking the note of the agent or by suing the agent and recovering judgment. If he makes his election after knowledge of the liability of the principal, he must stand by it. "If he sues the agent and recovers judgment he cannot afterwards sue the principal, even though the judgment does not result in the satisfaction of the debt." Lord CAIRNS, L. C., in *Kendall v. Hamilton*, *supra*. The reason of the rule was well stated by the same eminent judge: "If an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against his principal; while, if the principal were liable also to be sued, he would be vexed with a double action." *Kendall v. Hamilton*, *supra*.

The rule thus appears to be not only well settled, but also to be founded on sound reasons. It is in no way disturbed, or even questioned, in this state by the decision in *Middleton v. Railroad*, 62 Mo. 579, as appellant's counsel seem to suppose.

It is, of course, unfortunate that the plaintiff should lose his debt; but we cannot change the law to enable him to save it. His action against the agent and the principal jointly was unadvisably brought, and when the court put him to his election whether to proceed to judgment against the agent or the principal, if he was not prepared to elect for want of proper information as to the solvency of the parties, he should have taken a nonsuit.

We must affirm the judgment. It is so ordered. All the judges concur.

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STATE OF MISSOURI, Respondent, v. LUKE F. QUINN, Appellant.

St. Louis Court of Appeals, April 15, 1890.

Evidence considered and *held* insufficient to sustain the verdict.

Appeal from the Butler Circuit Court.—HON. JOHN G. WEAR, Judge.

REVERSED (*and defendant discharged*).

L. D. Grove, for the appellant.

R. F. Scott, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an indictment against a druggist for selling intoxicating liquors in less quantity than one gallon without having a physician's prescription or a dram-shop-keeper's license. The defendant was convicted, fined one hundred dollars, and appeals, to this court. The evidence does not support the verdict. It appeared that the defendant was duly registered as a pharmacist; that he had a merchant's license, but no license as a dramshop-keeper, and that he kept a drug store; that in the rear of this drug store there was a room separated from the store by a partition through which there was a door, which room had in it a barrel, and "several articles, a desk, stove and some chairs;" that the informing witness went into this back room and told one Ed. Lucas that he wanted some medicine, that he wanted a dram; that Ed. Lucas drew from the barrel "a small dose" in a small glass and gave it to the witness; and that it was not a gift but a sale. The witness

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could not say that the defendant was there; could not remember what Ed. Lucas was doing; could not say who was in charge of the business at the time, but Mr. Lucas waited on him.

It is perceived that, in the above testimony, there is nothing connecting Ed. Lucas with the defendant in any way, except so far as it is afforded by the mere fact that Ed. Lucas was there in the absence of the defendant and served the witness with a glass of whiskey, in the back room of the store. There was no evidence that Ed. Lucas was in charge of the store, that he was serving customers, or that he was in the general or even in the temporary employment of the defendant. The evidence is entirely consistent with the conclusion that Ed. Lucas may have done the act as an unauthorized or an officious person. If the action had been an action for civil damages, as was the action in the case of *Greene County to use v. Wilhite*, 29 Mo. App. 459, 466, where the rule of *respondeat superior* applies, it would not have made out a case against the defendant; for, while a man is answerable *civiliter* for the *torts* of his servants, he is not answerable for the torts of intermeddlers or officious persons. Much less will such evidence make out a case to go to a jury under a criminal indictment, within the principles laid down in *Casey v. State*, 6 Mo. 646, and *Town of Kirkwood v. Autenreith*, 11 Mo. App. 515, and 21 Mo. App. 74. We may add that, if Ed. Lucas was really in the employ of the defendant, the fact would seem to have been easily susceptible of proof.

Judgment reversed and defendant discharged. All the judges concur.

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JOHN P. TREICE, Appellant, v. H. N. HOLLADAY *et al.*, Respondents.

St. Louis Court of Appeals, April 15, 1890.

Practice, Appellate: BILL OF EXCEPTIONS. The ruling of a trial court in dismissing a cause upon motion of the appellee cannot be reviewed on appeal, if the motion, though copied into the transcript, is not preserved by the bill of exceptions.

Appeal from the Butler Circuit Court.—HON. JOHN G. WEAR, Judge.

AFFIRMED.

William N. Nalle, for the appellant.

S. M. Chapman, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This cause was commenced before a justice of the peace, and was appealed to the circuit court, where the plaintiff was allowed to file a "supplied account" in place of the original, which had been lost. There were then two trials, in both of which the juries failed to agree. Thereafter the court sustained a motion of the defendant to dismiss the cause. The entry of record, sustaining the motion and dismissing the cause, does not show on what ground the dismissal was predicated.

There is no bill of exceptions. What purports to be the motion, which the court sustained in dismissing the cause, is copied by the clerk into the transcript; but, in pursuance of a well-settled and oft-repeated rule, we cannot look to this motion for any purpose whatever; we cannot judicially know its contents, because it is not brought to our attention by a bill of exceptions. Our

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last decision on this point is *Monroe City Bank v. Finks*, *ante*, p. 367, in which we again went over the authorities for the instruction of those members of the bar who seem not to have learned the rule.

We are, therefore, called upon by this appeal to say, upon an inspection of the record proper, whether the court erred in dismissing the suit. We cannot say that it did. Many reasons exist why a suit may be dismissed without error, and, unless it is made to appear in an appellate court that a dismissal was made for a reason insufficient in law, the judgment of dismissal cannot be reversed. Judgment affirmed. All the judges concur.

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THE STATE *ex rel.* D. L. GRIFFITH *et al.*, Appellants, v. MILTON BOWERMAN *et al.*, Respondents.

St. Louis Court of Appeals, April 15, 1890.

1. **Appeal:** PROHIBITION. An appeal does not lie from the judgment of a lower court denying a writ of prohibition.
2. **Prohibition.** A writ of prohibition should not issue when the applicant has an adequate remedy by *certiorari*.
3. **Local Option:** VALIDITY OF ELECTION. An election under the local-option act is invalid, if it be held within sixty days of a municipal election, though the latter election was had without sufficient notice.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

APPEAL DISMISSED.

Geo. S. Rathbun, and *C. V. Buckley*, for the appellants.

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F. S. Heffernan, for the respondents.

THOMPSON, J., delivered the opinion of the court.

Two resident citizens of Springfield, Greene county, in this state, applied to the circuit court for a writ of prohibition, restraining the judges of the county court of that county from issuing certain dramshop licenses. After a preliminary order to show cause, a return and answer, and various other proceedings, which need not be set out, including a hearing on the merits, the respondents filed a motion to quash the proceedings, on various grounds, which we do not deem it material to state. This motion the court sustained, and rendered a final judgment denying the writ of prohibition. From this judgment the relators appeal to this court.

We are bound to consider at the outset, and of our own motion, whether we have jurisdiction of the appeal, since, if we have not, the mere silence of the parties on the question, or even their consent, cannot give it. It was held by the House of Lords in the case of the *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 545, that a writ of error does not lie to the King's Bench to reverse a judgment of that court denying a writ of prohibition. It was held in *Free v. Burgoyne*, 5 Barn. & Cres. 765, that a writ of error in such a case would not lie in the Court of Exchequer Chamber, such a remedy not having been given by statute. On the contrary, the recognized remedy in England, where a writ of prohibition is denied, seems always to have been to apply to another court having power to issue it. In *Lindo v. Rodney*, 1 Doug. 620, note, Lord MANSFIELD said that the relator could in such a case renew his application in every court in Westminster Hall. Commenting on these authorities Mr. Lloyd, in his modern work on the writ of prohibition, comes to the conclusion "that the only remedy, when a rule is discharged, is by an application to another court." Lloyd on Prohibition, 59.

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Our statute giving the right of appeal provides that "every person aggrieved by any final judgment or decision of any circuit court in any civil cause * * * may make his appeal," etc. This statute limits the right of the person, who may appeal, to "any person aggrieved;" but, in the opinion of this court, it was not intended to give a right of appeal where a right to prosecute an appeal or writ of error did not exist under the systems of remedial justice existing in England and in this state prior to the adoption of our code of procedure. As, under those systems, a mere refusal to issue a writ of prohibition against an inferior judicatory was not subject to appellate review, we take it that the statute was not intended to give appellate jurisdiction in such a case.

The remedy of the party aggrieved, if he has any right, would then be to apply to this court or to the supreme court for a new writ of prohibition, by analogy to the proceeding in cases of *habeas corpus*. But, in order to save vexation and expense to the parties, we go so far as to intimate to them that it will be useless for them to apply for such a purpose to this court, as we are clearly of opinion that this is not a case for a prohibition for two reasons: *First.* There is an adequate remedy by *certiorari* in behalf of any one who has any remedy at all. *Second.* The mere fact that the municipal election, which was held within sixty days of the local-option election, may have been irregular for want of sufficient notice, does not make it void so as to validate the local-option election; nor can its validity be collaterally tried in this proceeding, it having been ordered and held in a case allowed by law and by officers authorized by law.

We do not wish to be understood as expressing a doubt that an appeal lies from a final judgment *granting* a writ of prohibition.

This appeal will be dismissed. It is so ordered. All the judges concur.

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MORRIS ROSENTHAL, Respondent, v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, April 15, 1890.

Railroads: STATION AGENTS. Though the station agent of a railway company is a special agent, he is presumed as an incident to his position to have authority sufficient to enable him to attend to the safe loading of freight at his station, and, therefore, to contract on the part of the railway company for work on cars which is essential to the safe loading of such freight.

Appeal from the St. Francois Circuit Court.—HON. JAMES D. FOX, Judge.

AFFIRMED.

Henry G. Herbel, for the appellant.

(1) The court erred in admitting illegal and irrelevant testimony offered by plaintiff against defendant's objection. *Wells v. Railroad*, 35 Mo. 164; *Brown v. Railroad*, 67 Mo. 122; *Diel v. Railroad*, 37 Mo. App. 454. (2) The court erred in overruling defendant's demurrers to the evidence. *Sloan v. Railroad*, 58 Mo. 220; *Railroad v. Pratt*, 89 U. S. 123; *Snyder v. Railroad*, 60 Mo. 419; *Farber v. Railroad*, 32 Mo. App. 378; *State v. Young*, 12 S. W. Rep. 881. (3) The court erred in refusing to make the declarations of law prayed for by defendant.

Henry S. Shaw, for the respondent.

(1) Defendant's instructions did not declare the law, and were properly refused. *Harrison v. Railroad*, 74 Mo. 364; *Pruett v. Railroad*, 62 Mo. 540; Redfield

on Railways, p. 113; Story on Agency, secs. 127-443. (2) The agent's authority was within the scope of his employment. 74 Mo. 364; 62 Mo. 540. (3) The agent's prominence and conduct established a course of dealing from which his authority could have been presumed. *Loomis v. Railroad*, 17 Mo. App. 340; *White v. Railroad*, 19 Mo. App. 400; *Sewing Mach. Co. v. Railroad*, 70 Mo. 672. (4) The actual knowledge of the practice need not be shown by direct evidence; it may be inferred from circumstances. *Barry v. Railroad*, 98 Mo. 62.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action to recover twenty-six dollars and ninety-five cents, alleged to have been expended by the plaintiff at the defendant's request, in lumber, nails and labor, in repairing certain of defendant's grain cars, during the years 1883, 1884 and 1885. The plaintiff was a shipper of grain in bulk at Delassus station upon the defendant's road, and there was evidence tending to show that the repairs, made by him on the cars, were made with the consent of the defendant's station agent during the period mentioned, and that the charges were reasonable. The station agent sent the claim to the company, which, after retaining it for several months, declined to pay it. The repairs consisted of patching the floors of the cars, and making grain doors, when such doors were insufficient to carry bulk grain with safety. There was evidence tending to show that the station agent knew of these repairs, and that the company had paid for materials used in similar repairs, both before and after the period of time sued for herein. There was no evidence that it expressly agreed to pay for the particular material and work sued for herein, but there was evidence that the work done was beneficial to the company, that it retained the material furnished, and never forbade the doing of the work,

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although it knew constantly of its being done. Upon these facts, the court, which tried the case without a jury, found for the plaintiff. The errors assigned are that the court admitted illegal evidence, and erred in refusing to give proper declarations of law, asked by the defendant.

The following extract from the testimony of a disinterested witness, which is not gainsaid by anything in the record, will best illustrate under what circumstances these repairs were made:

"*Q.* It was of no permanent use or benefit to the cars, the kind of work that was done on them, shipping as grain cars? *A.* Yes, sir, I thought it was, very often there was holes in the bottom of the cars that you could put your foot through.

"*Q.* These cars had not been used for shipping grain in the bulk? *A.* Well, the majority I had anything to do with had, they were called grain cars, they were ceiled on the inside.

"*Q.* They had doors that you could make fast? *A.* Well, they had outside doors, a great many of those that he repaired had no doors, we had to make inside doors for them.

"*Q.* They were not properly grain cars then, they were not made so as to hold grain without loss? *A.* They were sent in for that purpose, they would order grain cars and that was the kind they sent in."

The testimony objected to consisted of conclusions drawn by witnesses from these facts, to the effect that the work was accepted by the company, and of proof of the station agent's knowledge of and consent to the repairs, which the defendant objected to as irrelevant, because the station agent could not bind the defendant by acts not within the scope of his authority. As there is substantially no controversy whatever about the facts of the case, we consider the rulings of the court, on these matters, as not affecting the question of plaintiff's

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right of recovery one way or another, and hence as not assignable for prejudicial error.

It is not claimed that, if these repairs had been made by the plaintiff, without the request, express or implied, of the company, he could recover their cost. The carrier, and not the shipper, has to determine the sufficiency of the cars, in the first instance. If any loss occurs to the shipper through their defect the carrier is responsible to him, but that does not authorize the shipper to remedy the defect at the carrier's expense. *Sloan v. Railroad*, 58 Mo. 220. This entire case, therefore, hinges on the proposition, whether the station agent's request that these repairs be made, under the facts shown, was within the scope of his authority; because, if it was not, there can be no recovery in this case.

The defendant contends that we cannot take judicial notice of the authority of a station agent; that he is a special agent who can bind his principal neither by his contracts nor by his torts, not within the scope of his official power and duty. That proposition is not denied and has repeatedly been applied where persons dealt with employes of railroad corporations. *Tucker v. Railroad*, 54 Mo. 177; *Brown v. Railroad*, 67 Mo. 122; *Farber v. Railroad*, 32 Mo. App. 378. We conceive, however, that its application to the facts of this case is in no way opposed to the right of plaintiff's recovery. We cannot take judicial notice that the authority of a station agent is greater than the work intrusted to his charge necessarily demands, but we must assume that his authority is sufficient to enable him to attend properly to work which is under his immediate charge and control. The loading of freight is part of the station agent's duties, and it is a necessary incident to such a duty, that the freight should be safely loaded. If the station agent himself had incurred an expense for material, absolutely essential to secure the safe loading

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of the freight, he unquestionably would have bound the company for the expenses thus incurred; and we can see no difference in principle between the case, where the expense is incurred by him, and where it is incurred by the shipper at his request upon an implied understanding, resulting from the course of dealing, that the shipper would be reimbursed.

If the so-called repairs herein would have been ought else than work essential to secure the safe loading of the freight, a different question might arise. In *Sloan v. Railroad*, *supra*, the standards were put upon the cars by the plaintiff voluntarily, without any request, express or implied on part of the carrier, or *any* of its agents, without notice to the carrier, and without even calling its attention to the supposed deficiency. Hence the ruling of the court nonsuiting the plaintiff in that case was unavoidable. It is evident, however, from the language used by Judge NAPTON that if any request of the company's agent, charged with the loading, had been shown in that case, the judgment would have been the other way.

Judgment affirmed. All the judges concur.

MARY E. PITCHER, Respondent, v. JOHN W. JONES *et al.*, Appellants.

St. Louis Court of Appeals, April 15, 1890.

Practice, Trial: ORDER OF PROOF. The order of proof is a matter mainly within the discretion of the trial court, and its ruling thereon will not be reversed when there is nothing showing an abuse of its discretion.

Appeal from the Greene Circuit Court.—HON. JOS. CRAVENS, Judge.

AFFIRMED.

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Goode & Cravens, for the appellants.

Silsby & Buckley, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiff, who is, and was at the dates hereinafter stated, a married woman, entered into a contract with the defendants, for the purchase of a certain lot of land, which was evidenced by the following memorandum:

"SPRINGFIELD, Mo., November 3, 1888.

"Received of Mrs. Mary E. Pitcher one hundred dollars cash payment on house and lot situate on Poplar street—deferred payment, twelve hundred dollars due January 1, 1889, at ten per cent. from date—possession to be given November 15, 1888. In case this proposition is not accepted by Mrs. Purveyance, this contract void and money returned to Mrs. Pitcher.

"JONES BROS."

Shortly after the execution of the memorandum she paid to the defendants fifty dollars additional. Not being able to obtain possession of the lot on November 15, 1888, as specified in the memorandum, she demanded the one hundred and fifty dollars, and, upon the defendant's refusal to repay the money to her, she instituted this suit before a justice of the peace for its recovery, and obtained judgment for the amount, both before the justice of the peace and in the circuit court.

The defendants, appealing, assign for error that the court admitted irrelevant evidence, refused to give proper declarations of law asked by them, and committed error in permitting plaintiff to take the stand, and vary her previous testimony, after the cause had been submitted to the court sitting as a jury.

The testimony, which was claimed to be inadmissible for irrelevancy, was evidence tending to show that the plaintiff could not obtain possession on November 15,

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there being a tenant in possession who refused to vacate. The defendants objected to this evidence on the ground that they were mere agents, and known to be such to the plaintiff, and that the money was returnable to the plaintiff only in case Mrs. Purveyance did not accept the terms of the contract; that, after Mrs. Purveyance accepted the terms of the contract, the plaintiff's action was against her, and not against the defendants. It is sufficient answer to this question, that there is no evidence whatever in the record that Mrs. Purveyance ever accepted the terms of the contract as made. Her entire testimony which is all the testimony on the subject is as follows:

"I was the owner of the property, known as 437 Poplar street, in Springfield, Missouri. I placed it in the hands of Jones Bros. to sell for me. One of defendants came to me and said they had sold the property to Mrs. Pitcher for thirteen hundred dollars; that I was to have one hundred dollars down, and the balance on first day of January, 1889, with ten per cent. interest. I told him that was satisfactory to me, and my husband joined me in a deed which was made to Mrs. Pitcher. The property was in my name."

It will thus appear that it is not shown that Mrs. Purveyance was ever advised, much less that she ever consented to give possession November 15, 1888, which was as much a condition of the contract as any other. The assignment of error, therefore, which relates to the admission of evidence that the plaintiff could not get possession, must be ruled against the defendants. For like reason, if no other, instructions asked by the defendants, declaring that the plaintiff had no cause of action against them, if Mrs. Purveyance accepted her proposition, were properly refused, regardless of the question whether they embodied correct legal propositions, as there was no evidence to support them.

In regard to the last assignment of error we may say that the order of proof is a matter mainly within

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the discretion of the trial court. Such discretion has been held not to be abused by inverting the order of proof in *Pier v. Heinrichshoffen*, 52 Mo. 333, by allowing evidence in chief to be introduced after the close of defendant's case in *Burns v. Whelan*, 52 Mo. 520, and after a demurrer to the evidence in *Tierney v. Spiva*, 76 Mo. 279. There is nothing in this case which shows any abuse of discretion. It does not appear that the defendants could have rebutted the evidence given by the recalled witness, if she would have testified to the same facts in chief, nor does the explanation of her evidence which the court permitted affect, in any way, the merits of the action; it at most goes to the question of a defect of parties, which the trial court might have remedied by amendment. *Mueller v. Kaessmann*, 84 Mo. 331.

We are asked to affirm the judgment with damages. It is an action for money withheld by the defendants from the plaintiff on wholly untenable grounds, and as above seen, there is no proposition involved in the case which is fairly debatable. We therefore affirm the judgment with ten per cent. damages. All the judges concur.

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CITY OF SPRINGFIELD, Respondent, v. MICHAEL FORD Appellant.

St. Louis Court of Appeals, April 15, 1890.

1. **Pleading:** ACTION FOR RECOVERY OF FINE UNDER MUNICIPAL ORDINANCE. The sufficiency of a statement of a cause of action for the recovery of a penalty for the violation of a municipal ordinance is not tested by the rules appertaining to criminal proceedings; only that degree of certainty is requisite, which is necessary to inform the defendant of what he is called upon to answer.

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2. **Practice, Appellate**: FAILURE TO SAVE EXCEPTION. Neither a ruling permitting an amendment of the pleadings, nor one on the admissibility of evidence, can be reviewed on appeal, if no exception thereto is saved.

3. **Criminal Law**: SELLING LIQUORS WITHOUT LICENSE: SUFFICIENCY OF THE EVIDENCE. In a proceeding under a statute or municipal ordinance subjecting persons to a fine for the sale of liquors without a license, a single sale is sufficient to support a conviction.

Appeal from the Greene County Criminal Court.—HON. M. OLIVER, Judge.

AFFIRMED.

F. S. Heffernan, for the appellant.

E. A. Barbour, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action of debt for the violation of an ordinance of the city of Springfield, which subjects anyone who shall within the city sell intoxicating liquor of any kind in quantities less than five gallons, and not less than one pint, to a fine not exceeding one hundred dollars, unless he has taken out a license as a retail liquor dealer.

The defendant was sued for a violation of this ordinance, and a recovery was had against him for fifty dollars. He appeals and assigns for error that the complaint states no cause of action, that the court improperly permitted an amendment of the complaint to be made upon the trial, and admitted illegal evidence, and that there was no evidence in support of the verdict.

The complaint states, in substance, that the defendant is indebted to the plaintiff in the sum of one hundred dollars, for the violation of an ordinance (naming it, and reciting its material points) in this, to-wit, that, being a retail liquor dealer as defined by said ordinance, he did in December, 1888, sell one gallon of wine, the

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same being an intoxicating drink, without having taken out a license therefor.

The defendant refers us to several cases, which hold that a criminal information or indictment, containing no more than this statement does, would be fatally defective. This we assume he does on the supposition that this is in the nature of a criminal proceeding by information. That, however, is a mistake. It was decided in *St. Louis v. Smith*, 10 Mo. 438, that proceedings of this character are actions of debt, and may be assimilated to civil proceedings before justices of the peace; and that degree of certainty only is required in the statement, which is sufficient to inform the defendant of what he is called upon to answer. Such has ever since been the law of this state. *St. Louis v. Knox*, 74 Mo. 79. Tested by this standard, the complaint is clearly sufficient.

We find that, although the defendant objected to the amendment of the complaint upon the trial, he saved no exceptions to the court's ruling in permitting it; hence the question of the propriety of the amendment is not before us for review, nor do we find that the defendant saved any exceptions to the admission of evidence.

The only other complaint is that the evidence fails to support the verdict. Only one sale was charged in the complaint to have been made by the defendant, and only one sale was shown by the evidence to have been made by him, namely, the sale stated in the complaint, and the defendant claims that the evidence was insufficient to constitute him a retail liquor dealer, as defined by the third section of the ordinance under which the action is brought, and which is as follows.

"Any person, etc., who shall within the city sell intoxicating liquors of any kind in quantities less than five gallons, and not less than one pint, and shall prevent the same from being drunk on the premises where sold, shall be considered a retail liquor dealer, and shall be required to take out license therefor."

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The contention of the defendant on this subject is, that a simple sale does not constitute a dealer, and he cites in support *Overall v. Bezeau*, 37 Mich. 506, and *United States v. Mickle*, 1 Cranch, C. C. 268. The first of these cases decides that the sale of an entire stock of goods of a merchant does not constitute the party making it a wholesale dealer so as to avoid a note, given in payment, for illegality on the ground that the vendor has no license as a wholesale dealer; and the second decides that a gratuitous distribution of drinks at a gaming table does not constitute a party a retail dealer in liquors. Neither of these cases has any application to the case at bar. Here the evidence shows that the wine was bought of defendant in the usual course of business, and the ordinance defines who shall be considered a liquor dealer. It has been repeatedly decided that under statutes and ordinances subjecting a person to a fine for sale of liquors without license, a single sale is sufficient to support a conviction. *State v. Andrews*, 27 Mo. 267; *State v. Small*, 31 Mo. 197; *City of Kansas v. Muhlebach*, 68 Mo. 638.

This disposes of all the assignments of error, and finding that none of them is well assigned, we affirm the judgment. So ordered. All concur.

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B. F. Clements, Agent of the Goodspeed Publishing Company, Appellant, v. J. T. Greenwell, Respondent.

St. Louis Court of Appeals, April 15, 1890.

1. **Practice, Trial:** CHANGE OF VENUE. A change of venue may be taken in the circuit court in a cause appealed thereto from a justice of the peace.

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2. ——— : ———. The application for a change of venue must be verified by the affidavit of a party to the cause; but objection to the granting of it, because it is not thus verified, must be made in the court granting it, and cannot be urged in the court to which the venue is changed.

3. ——— : AMENDMENT OF PARTIES. The complete change of parties plaintiff, by the substitution of a new plaintiff for the one in whose name the action was commenced, is a change of the cause of action, and, therefore, is not a proper amendment.

4. ——— : ———. In an action instituted before a justice of the peace and appealed to the circuit court, the entries on the justice's docket determine who are the parties plaintiff or defendant; but *semble*, that in an action in which the justice's docket entries named "A., agent of B," as the plaintiff, while the statement of the cause of action filed with the justice was based on a contract alleged to have been made by the defendant with B., such entries were open to explanation, showing that the cause of action tried before the justice was the claim of B. against the defendant, and that, on such showing, an amendment was permissible, continuing the cause in the name of B. alone.

Appeal from the Bollinger Circuit Court.—HON. J. D. FOX, Judge.

REVERSED AND REMANDED.

Thomas B. Whitledge and *B. B. Cahoon*, for the appellant.

John V. Nowell and *Charles A. Killian*, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This suit was instituted before a justice of the peace in Perry county upon the following statement filed as the plaintiff's cause of action.

"B. F. Clements, Agent for Goodspeed Publishing Company, plaintiff,
against
"J. T. Greenwell, defendant.

"Plaintiff states that defendant, by his contract in writing, herewith filed, promised and agreed to pay to

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the Goodspeed Publishing Company, a firm composed of W. A. and C. L. Goodspeed, of Chicago, Illinois, the sum of twelve dollars 'upon presentation or delivery by plaintiff to defendant of a book entitled "History of Southeast Missouri."' That plaintiff has complied with the contract on his part, but defendant has failed and refused, and still refuses, to pay plaintiff said sum of twelve dollars, for which amount with costs he prays judgment. J. J. SEIBEL,

"Attorney for plaintiff."

Judgment was rendered in favor of defendant by the justice, and the plaintiff took an appeal to the circuit court. In the circuit court C. L. Goodspeed and W. A. Goodspeed, composing the firm and doing business under the name of the Goodspeed Publishing Company, filed their application for a change of venue of the cause from Perry county to some other county, on the ground that the citizens of Perry county were prejudiced against them, and the circuit judge changed the venue to Bollinger county. In the circuit court of Bollinger county the defendant moved to strike the cause from the docket on the ground that the change of venue had been improvidently granted, for the reason that the circuit court cannot change the venue of a cause coming to it by appeal from a justice of the peace, and on the further ground that the change of venue was granted, not on the application of the plaintiff, but on application of C. L. Goodspeed and W. A. Goodspeed, who were strangers to the record.

Before this motion was determined, C. L. Goodspeed and W. A. Goodspeed moved the court to amend the statement, by striking out the name of B. F. Clements as plaintiff, and inserting their names in lieu thereof. The court overruled their motion, sustained the defendant's motion to strike the case from the docket, and then rendered judgment against the plaintiff and his sureties on the recognizance for costs.

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It will be seen from the foregoing recital that the judgment of the court was erroneous on any theory. If the venue of the case was improvidently changed from Perry county to Bollinger county, the circuit court of the latter county could not make any final judgment therein against the plaintiff and his sureties. All that it could do in that event was to order a re-transfer of the cause to the Perry county circuit court. And if the venue was properly changed, it could not make any final judgment, simply because it refused to allow an amendment of the statement, which the plaintiff asked.

Concluding, as we must on this state of the record, that the judgment is erroneous, and must be reversed, we proceed to examine the other questions presented, which necessarily must be disposed of after the cause is remanded. The first of these questions is, whether the venue was properly changed to the Bollinger county circuit court. The defendant claims that the change of venue was illegal for two reasons, first, because the cause having originated before a justice, the venue thereof could not be legally changed to another county, and, next, because W. A. and C. L. Goodspeed, not being parties to the suit, the venue could not be changed on their application.

The first of these propositions is very fully and elaborately argued by counsel, and must be answered by the construction placed upon the statute, as the right to change the venue is purely statutory. *Lewin v. Dille*, 17 Mo. 64; *Huthsing v. Maus*, 36 Mo. 101. The statute of 1879, section 3729, provides that "a change of venue may be awarded in any civil suit to any court of record." The defendant contends that the words, "to any court of record," limit the right to a change of venue to causes where the suit is originally brought in a court of record, and excludes such right in cases where the suit is brought to the circuit court by appeal.

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The proper meaning of these words is, that the venue must be changed from a court of record to a court of record, regardless of the fact where the suit originates, and that, as far as we are aware, has always been the construction placed upon the statute. Were it otherwise, a party appealing a cause from a justice to the circuit court in a county, whose inhabitants are prejudiced against him, would be compelled to try his cause before a biased tribunal, as there is no provision of law providing for a jury *venire* to another county. Some of the most important cases such as forcible entry, unlawful detainer and landlord's summons, must originate before a justice of the peace, and in the county where the property is situated, and if in such cases the inhabitants of the county are prejudiced against either party, it would be unreasonable to construe a statute, designed to secure unbiased triers of the fact to every litigant, as denying him the right to a change of venue, by which alone he can secure unbiased triers of the fact.

The cases cited by the defendant are not in point. In *Powell v. Sutro*, 80 Cal. 559, the application was made in the superior court after answer filed, and it was held it came too late, as the statute required it to be made before answer; and that is all that that case decides. In *Hoshall v. Hoffacker*, 11 Md. 362, the question depended on the construction of the constitution, and statutes enacted following its language, which were seemingly restrictive of the right of removal. The case was an appeal from the decision of county commissioners in a road case, and the court denied the right of removal while the case was pending on appeal. LeGrand, C. J., doubted the propriety of the decision of the court, and merely concurred in order to settle the law. In Mississippi the statute expressly confines the right of removal to cases originating in the circuit court, hence the case of *Yalabusha County v. Carbry*, 11 Miss. (3 S. & M.) 529, can have no application. On

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the other hand in the case of *Smith v. Monks*, 55 Mo. 106, in which the cause of action originated before a justice of the peace, several successive changes of venue were taken after appeal to the circuit court, and, although the point seems to have been distinctly made in the supreme court that they were improperly taken, the court in referring to them merely says that they were *not very regularly taken*, impliedly admitting that they could be taken. We must conclude that a change of venue, if otherwise authorized, cannot be denied on the sole ground that the cause did not originate in a court of record.

The application for a change of venue in this case was not supported by the affidavit of a party to the action, and might have been properly refused on that ground. *Norvell v. Porter*, 62 Mo. 312; *In the Matter of Whitson's Estate*, 89 Mo. 58. But as decided in *State v. Dodson*, 72 Mo. 283, and in *Squires v. Chillicothe*, 89 Mo. 226, that objection ought to have been made in the court granting the change of venue, and not in the court to which the cause was removed. Hence, we must conclude that on that branch of the case the law is also with the plaintiff, and that the circuit court of Bollinger county should have retained jurisdiction of the case after the papers were transferred to that court, even though the application made for a change of venue was informal.

This brings us to the main question in the case, and that is, whether the statement filed before the justice could be amended in the circuit court in the manner in which it was sought to be amended. The answer to this question must be determined by the fact, whether B. F. Clements was in point of fact the sole plaintiff in the action instituted before the justice of the peace. If so, the amendment could not be made, because the utmost liberality, which prevails in regard to amendments on appeal of statements filed before justices of the peace, does not go to the extent of permitting a

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complete substitution of one party plaintiff for another. As Judge PHILIPS properly remarks in *Thieman v. Goodnight*, 17 Mo. App. 434, that would be an amendment not of the plaintiff's cause of action, but of another person's cause of action. There can be no substitution of one cause of action for another by amendment even in actions originating in the circuit court (*Scovill v. Glasner*, 79 Mo. 452; *Hall v. School District*, 36 Mo. App. 23), much less in actions appealed to the circuit court from justices of the peace, touching which the statute expressly provides that the same cause of action that was tried before the justice, and no other, shall be tried before the appellate court upon the appeal. The plaintiff contends that, because the written contract filed before the justice shows that it is an offer to pay a certain sum of money to the "Goodspeed Publishing Company" on certain conditions, it is to be assumed that the paper thus filed, was the cause of action. The answer is that that paper in itself constitutes no cause of action whatever, as it fails to show any performance by any one of the condition whereon the money became payable, and, next, that the fact who the parties plaintiff and defendant were before a justice of the peace, is determined *prima facie* by the justice's docket entries, and not by names given in papers filed before the justice, in which they are not even designated as parties plaintiff or defendant. *C. H. Conrades & Co. v. Spink*, 38 Mo. App. 309. The justice's docket states the plaintiff's name as B. F. Clements, agent of the Goodspeed Publishing Company, the summons issued by the justice cites the defendant to answer the complaint of B. F. Clements, agent of the Goodspeed Publishing Company. The transcript filed in the circuit court purports to be a transcript of the pleas and proceedings constituting the record proper in a certain cause, wherein B. F. Clements, agent of the Goodspeed Publishing Company, was plaintiff, and James T. Greenwell was defendant. It would seem from this that the cause of action, which

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was tried before the justice, was whether Clements had any cause of action against the defendant and not whether the members composing the firm of the Goodspeed Publishing Company had such cause of action or not.

It is apparent from the foregoing that the circuit court committed no error in refusing an amendment, which contemplated an entire substitution of new parties plaintiff in lieu of the only party plaintiff in the case, in the absence of any showing that the justice's docket entries were erroneous, and that the cause of action really tried before the justice was that of W. A. Goodspeed and C. L. Goodspeed, plaintiffs, against the defendant. In view of the great liberality, which is now permitted on the subject of such amendments under the provisions of section 3060 of the Revised Statutes of 1879, we are not prepared to say that the court should not, in furtherance of justice, upon a clear showing that the cause of action tried before the justice was one by the firm against the defendants, permit an amendment of the plaintiff's cause of action in conformity with the facts, but we do say that, in absence of such showing, the ruling of the court on that branch of the case was correct.

Reversed and remanded. All the judges concur; Judge BIGGS in the result.

JOHN M. KEITHLEY, Appellant, v. R. H. PITMAN *et al.*, Defendants; JOHN PITMAN, Garnishee, Respondent.

St. Louis Court of Appeals, April 15, 1890.

Debtor and Creditor: GARNISHMENT. The sale of property at a fixed valuation which is to be applied towards the payment of the indebtedness of the vendor, the time and manner of such application being left to the discretion of the vendee, does not constitute an enforceable appropriation towards specific indebtedness, and the vendee is accordingly answerable as garnishee of the vendor

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for so much of the purchase money as he has not, prior to the garnishment, either actually paid, or bound himself to pay, on particular indebtedness of the vendor; nor is an application of such purchase money towards such indebtedness any defense to the garnishment, if it was made after the garnishment.

Appeal from the St. Charles Circuit Court.—HON. W. W. EDWARDS, Judge,

REVERSED AND REMANDED.

Ora A. Keithley, C. W. Wilson, for the appellant.

The balance of $1194.67, which was in John Pitman's hands at the time the garnishment was served on him, was subject to garnishment by D. K. Pitman's creditors. *Ridge v. Olmstead*, 73 Mo. 578; *Nicholson v. Walker*, 25 Mo. App. 368–377; *Briggs v. Block*, 18 Mo. 281–283; *Sproule v. Agnew*, 7 Mo. 62; *Corey v. Powers*, 18 Vt. 587; *McGuire v. Wilkinson*, 72 Mo. 202; *Casebolt v. Donalson*, 67 Mo. 308. The purchase price of the land was money due the execution debtor, D. K. Pitman, and he could countermand his orders in relation to it, at any time before it was paid out by the garnishee. *Ridge v. Olmstead*, 73 Mo. 580; *Nicholson v. Walker*, 25 Mo. App. 375; *Henry County v. Allen*, 50 Mo. 233; Story on Agency [9 Ed.] sec. 463. There was no novation of the debt or substitution of creditors. This can only be done by the assent of the creditor. *Vanderline v. Smith*, 18 Mo. App. 60; *Lee v. Porter*, 18 Mo. App. 378. It having been shown that the money of the execution debtor was in the hands of the garnishee, the burden rests upon the garnishee to show that the fund was charged with a trust. *Frank v. Frank*, 6 Mo. App, 588. The garnishee had no right to pay out any of the funds in his hands after he was served with the garnishment, and the fact that he did so does not relieve him of accountability to the plaintiff. 8 Am. &

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Eng. Ency. of Law, pp. 1200, 1201, and cases cited; *McGarry v. Coal Co.*, 93 Mo. 240–241, and authorities cited.

T. F. McDearmon, for the respondent.

By the agreement between the garnishee and D. K. Pitman the relation of debtor and creditor was created between the garnishee and the creditors of D. K. Pitman, and said creditors could have at any time sued and put into judgment their claims against the said John Pitman. *Holt v. Dollarhide*, 61 Mo. 433; *Bresshears v. Rowe*, 46 Mo. 501; *Schuster v. Railroad*, 60 Mo. 290; *Rodgers v. Peak*, 51 Mo. 446; *Brown to use v. Brown*, 47 Mo. 130; *Rodgers v. Gossnell*, 51 Mo. 466; *Cress v. Blodgett*, 64 Mo. 449; *Bank of Mo. v. Benoist*, 10 Mo. 519; *Robbins v. Ayers*, 10 Mo. 538; *Beardslee v. Morgner*, 4 Mo. App 139; s. c., 73 Mo. 22; *Fitzgerald v. Barker*, 4 Mo. App. 105. These authorities establish the right of the creditors of D. K. Pitman to sue John Pitman on the aforesaid agreement. This right to sue could not exist in D. K. Pitman and his creditors at the same time, for the same debt. In the garnishment process the plaintiff stands in the shoes of his debtor and has no greater rights against the garnishee. *McPherson v. Railroad*, 66 Mo. 103; *Weil v. Tyler*, 38 Mo. 545; *Funkhauser v. Earland*, 3 Mo. App. 602. In order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due as a money demand unaffected by liens or prior incumbrances or conditions of contract. *Scales v. Hotel Co.*, 37 Mo. 520; *Huge v. Fruin*, 18 Mo. App. 139; *Reinhardt v. Soap Co.*, 33 Mo. App. 24.

ROMBAUER, P. J., delivered the opinion of the court.

This is a garnishment upon execution. The plaintiff's denial of the garnishee's answer charges that, on May 10, 1887, D. K. Pitman, one of the defendants in

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the execution, sold to the garnishee certain land for the sum of twelve thousand dollars, and that a large amount of the purchase money, to-wit, five thousand dollars, had not been paid by the garnishee at the date of the garnishment. The garnishee's reply consists of a general denial.

The garnishee is the son of one of the defendants in the execution, and it stands admitted that the defendant sold to him the land mentioned in the denial, at the date therein stated, for twelve thousand dollars. The transaction is thus described by the father: "I told John that, if he had the money and wanted to buy the land at twelve thousand dollars, I would sell to him, but that, if his object was to buy simply for the purpose of relieving me by furnishing money for the payment of my debts I would not sell to him, as I did not wish to incumber or burden himself with debt, just to relieve me. John told me that he really wanted to buy the property, and I then sold to him for twelve thousand dollars, and made him a deed to the property. No part of this purchase money was paid to me, not one cent of it. As I have already said, I was considerably in debt, and, as I am getting quite old, I just directed him to apply this money to the payment of my debts as far as it would go. The price paid for the land was twelve thousand dollars, and he was to pay my debts so far as it would go. I don't know how much has been paid out by him. He has paid a large part of it; he told me some time ago, that he had paid ninety-five hundred dollars of it."

On cross-examination the witness said: "The contract price of the land was twelve thousand dollars. There was no arrangement or understanding that he was to prorate this money among my creditors, or pay a per cent. on all their claims against me. I only directed that he should pay my individual debts in full. I only owed one individual debt, and that was a debt of about

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twelve hundred dollars, that I owed to my grandson, W. W. Pitman. I requested that that debt be paid in full. All the other claims against me were security debts, debts which I owed as security for my son, R. H. Pitman (his co-defendant herein). As to those debts, I left to my son John's discretion to pay them as he pleased. He was to pay such debts at such times as he saw fit. He reported to me that he had paid out about ninety-five hundred dollars."

The garnishee himself testified on behalf of plaintiff: "I am the garnishee in this case, and the son of the defendant, D. K. Pitman. I bought the tract of land from my father, D. K. Pitman, for the sum of twelve thousand dollars. I paid no part of the purchase money over to my father. He was considerably in debt at the time of the purchase, and gave me a list of his debts, and directed me to apply the twelve thousand dollars to the payment of his debts, as far as it would go. He did not know the exact amount of his debts, from the fact that he did not know what amount of interest had accumulated on them." And again: "There was no understanding that the money would be applied *pro rata*, to all the debts mentioned. There was no direction as to how, or to what debt, I should apply the money, except that I was to pay his individual debt to W. W. Pitman and wife, about twelve hundred dollars. No time was fixed as to when I should make the payments. The matter was left to my discretion."

R. H. Pitman, one of the defendants in the execution, testified for plaintiff: "I was present at the time of the sale of the land by my father to my brother John, and heard what passed. The land was sold for twelve thousand dollars, and my brother was to apply the money to the payment of my father's debts. The debts were nearly all debts that my father owed as security for me. A list of the debts was made out, and included the debt to Mr. Keithley."

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It further appeared by the garnishee's own evidence, that he had paid, up to the date of the garnishment, eighteen hundred and five dollars and thirty-three cents of his father's debts, leaving unexpended, at that date, eleven hundred and ninety-four dollars and sixty-seven cents of the purchase money, and that he paid, subsequent to the date of the garnishment, ten hundred and nineteen dollars of such debts. The claim of plaintiff herein is upon a judgment for fourteen hundred and twenty-three dollars and ninety-two cents remaining wholly unpaid.

The good faith of the sale by D. K. Pitman to his son, the garnishee herein, is nowhere questioned, and the only question for decision is, whether, under the conceded facts, by such sale the relation of debtor and creditor was established between the vendee and vendor, or between the vendee and the vendor's creditors.

The trial court rendered a judgment for the garnishee, and, in so doing, necessarily held that the latter of these propositions was the correct conclusion of law upon the admitted facts. Whether this ruling was error, is the only question presented for our consideration upon this appeal.

It is not pretended that this is a question of novation. The creditors of D. K. Pitman did at no time agree to a substitution of John Pitman as their debtor in lieu of his father. Notwithstanding the sale, their cause of action against D. K. Pitman remained intact. That proposition is self-evident. It is held in this state that a promise made by A. to B. to pay B.'s debt to C. is not within the statute of frauds, and that C. may maintain an action thereon against A. *Bessheays v. Rowe*, 46 Mo. 501; *Brown to use v. Brown*, 47 Mo. 130, 132; *Holt v. Dollarhide*, 61 Mo. 433; *Cress v. Blodgett*, 64 Mo. 449. If, therefore, in the present case the obligation assumed by the son, to pay certain creditors of his father's, would have become absolute by the transaction above stated, it might well be said that the

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son would have ceased to be a creditor of his father in any other sense than that, which still left in his father a right for his own protection to insist upon the fulfillment of these obligations. The money debt in such event could not be due at the same time both to the father and the father's creditors. But we see nothing in the facts of this case to bring it within the above principle. The testimony of all the witnesses concurs that the consideration of the sale was not a payment of the father's creditors in full, for which purpose the consideration was insufficient, nor the payment of any particular creditors in full, or *pro rata*, which such creditors could have enforced by suits against the son, but a payment at the discretion of the son as to the time and amount, which neither the father nor the creditors could have specifically enforced. At the same time the testimony of all the witnesses concurs that the consideration of the sale was twelve thousand dollars in money, and that the sale was one in absolute good faith and in no sense in fraud of creditors. It is our duty to uphold this transaction as one made in good faith, if it can be thus upheld. For the purpose of so doing, we must conclude from all the evidence that the son continued indebted to his father, until he had expended the entire sum of twelve thousand dollars for the payment of his debts, and that such indebtedness was decreased only, as the payment of such debts progressed.

It is evident that we must either treat this conveyance as one not based upon a valuable consideration, and as such fraudulent against existing creditors, and this is opposed to the intentions of the parties as shown by all the evidence, or else we must treat it as a deed upon a money consideration of twelve thousand dollars, which is in harmony with the intention of the parties, and all the evidence. If we treat it as the latter, this consideration was to be paid to some one, and as no one besides the grantor, from whom the counter consideration moved, had a right to exact it, it necessarily

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follows that, until it was paid, it remained the property of the grantor. This is substantially the principle on which the decisions in *Ridge v. Olmstead*, 73 Mo. 578, and in *Nicholson v. Walker*, 25 Mo. App. 368, rest.

If the money was the property of the grantor, the rights of the parties have to be determined by the existing state of things at the date of the garnishment. R. S. 1879, sec. 2520. At the date of the garnishment, under the conceded facts of this case, the garnishee was indebted to the execution defendant in the sum of eleven hundred and ninety-four dollars and sixty-seven cents, and, as the plaintiff's execution against the defendant is for a larger sum, the garnishee is *prima facie* liable to the plaintiff for the amount of this eleven hundred and ninety-four dollars and sixty-seven cents then in his hands. The fact that, between that date and the day of trial, he paid of this amount ten hundred and nineteen dollars to other creditors, cannot change his liability, except as hereinafter stated, as the garnishment has the effect of attaching the defendant's moneys and credits in the garnishee's hands.

It necessarily results from this that the judgment of the trial court must be reversed. We are asked to reverse it with directions to enter judgment against the garnishee for the amount shown to be in his hands at the date of the garnishment, and would do so but for the following facts. It appears in evidence that, since the garnishment, the garnishee did pay on a judgment of Darius Heald against his grantor the sum of eight hundred and sixty-nine dollars, but it does nowhere appear whether such judgment was rendered against D. K. Pitman prior or subsequent to May 10, 1887, the date of the deed from D. K. Pitman to his son. If rendered prior to such date, the judgment was a lien upon the land, and the garnishee had a right to discharge it as part of the purchase money, notwithstanding the subsequent garnishment, unless he assumed by the terms of the deed the payment of liens, and agreed to pay

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twelve thousand dollars besides. The same result would follow, if the garnishee, by an independent and legally binding obligation towards Heald, had agreed with him prior to the garnishment to discharge the judgment in part consideration of the sale. In order that these facts may be ascertained we will remand the cause to be proceeded with in conformity with this opinion.

Reversed and remanded. All concur.

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B. S. WILLIAMS & Co., Appellants, v. CLEMENT A. KITCHEN, Respondent.

St. Louis Court of Appeals, April 15, 1890.

Former Recovery. Although two promissory notes are given in one transaction by a common maker to a common payee, they constitute independent causes of action, and the recovery of judgment upon one of them in a suit brought by the payee against the maker after the maturity of both will not debar a recovery on the other.

Appeal from the Stoddard Circuit Court.—HON. JOHN G. WEAR, Judge.

STRICKEN FROM DOCKET for failure of the record to show an appeal.

Houck & Keaton, for the appellants.

ROMBAUER, P. J., delivered the opinion of the court.

The following uncontroverted facts appear from the record. The defendant in part payment of a windmill gave to plaintiffs two promissory notes for one hundred and eighteen dollars and eighty-three cents each, one payable August 4, 1884, including days of grace, and the other payable May 4, 1885, and both bearing eight per cent. interest from maturity. Both notes remaining unpaid, the one last maturing was first sued, and the

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plaintiffs recovered judgment thereon which the defendant satisfied. Subsequently the plaintiffs instituted the present action on the note first maturing, and the circuit court, upon the trial of it, rendered judgment in favor of the defendant on the ground, as the record recites, "that both notes were given in the same transaction, to-wit, the purchase of a windmill by the defendant from plaintiffs, each for a part of the consideration of said windmill, and that they were both due when the first suit was brought on the note last due."

It will thus appear that, on the uncontroverted facts, the plaintiffs were entitled to judgment for the amount of the note sued on with interest from maturity at the rate of eight per cent. per annum. It is an elementary proposition that every promissory note is an independent and separate cause of action, and it is evident that the principle of former recovery was thoroughly misunderstood and misapplied by the trial court. We regret that, under these circumstances, we cannot make a final disposition of the cause now; but the record before us fails to show that an appeal has ever been allowed in the case, and hence we must strike the cause from our docket, and remit the plaintiffs to their remedy of bringing it here by writ of error, unless their claim should be satisfied by the defendant. All the judges concurring the case is stricken from the docket.

JOHANNA HEFFERNAN, Respondent, v. SUPREME COUNCIL AMERICAN LEGION OF HONOR, Appellant. 40 605 / 77 241

St. Louis Court of Appeals, April 15, 1890.

1. **Pleading:** VARIANCE. When the petition in an action for the recovery of benefits, in the nature of insurance, alleges an unconditional contract to pay such benefits, while the evidence establishes

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only a contract to pay on the performance of certain conditions precedent, this difference constitutes only a variance, and such variance is not material when it could not have misled the defendant.

2. **Benevolent Associations:** MUTUAL BENEFIT INSURANCE. Provisions in the by-laws of a benevolent association, requiring a certain form of notice of assessments for mutual benefit insurance to be given to members under a corporate or official seal, and providing that no paper issued by authority of the association should be official unless thus sealed, may be waived. And the evidence is sufficient to warrant a finding of such a waiver when it establishes an unbroken usage for years on the part of the association to give notices of assessments not thus sealed, and on the part of all of the members of the association, including the beneficiary in the case in hand, to treat such notices as sufficient.

3. ——: ——. The fact that the weight of the evidence in an action at law is with the appellee will not prevent a reversal of the judgment appealed from, when there was prejudicial error in the trial of the cause.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

REVERSED AND REMANDED.

F. H. Bacon, for the appellant.

Thomas A. Russell, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

The petition states that the defendant is a benevolent corporation, and that one Martin C. Heffernan, the plaintiff's son, became its beneficiary member in February, 1884, and received from it a benefit certificate, whereby it agreed to pay two thousand dollars to the plaintiff on the death of the said Martin C. Heffernan; that Martin C. Heffernan continued in defendant's order until the twenty-eighth of June, 1889, when he died, a member of said order, in good standing, and that

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the defendant thereby became bound to pay to the plaintiff the said sum of two thousand dollars, but, upon demand, refused to so do, wherefore the plaintiff sues, etc.

The answer, after setting up the laws of the defendant's order, alleges that the certificate issued to Heffernan was a conditional promise to pay the sum therein named to the beneficiary, only on the condition that Heffernan should comply with all the laws, usages and requirements of the order, and should be a member, in good standing, therein at the time of his death. The answer then proceeds: "That said Martin C. Heffernan did not faithfully comply with all the laws, usages and regulations of said order, and did not punctually pay all assessments for which he was liable, and was not, at the time of his said alleged death, a member, in good standing, in said order, in that said Heffernan did not pay, within the time prescribed by the laws of said order, nor at any other time, certain assessments, required by said order and its laws, and paid by the other members of said LaFayette Council and said order, to-wit: Assessment number 153, called May 1, 1889, and payable on or before June 1, 1889, and also assessment number 154, called May 1, 1889, and payable on or before June 15, 1889, whereby, under the said laws, said Heffernan became suspended from said order, and, under his said contract, and the laws and rules of said order, the said benefit certificate became null and void, and all rights thereunder were forfeited and lost."

The reply was, in substance, a general denial of the affirmative defense. The cause was tried by the court without the intervention of a jury, the trial resulting in a judgment for the plaintiff.

The errors assigned on this appeal are that the court erred in admitting evidence of a conditional promise in support of a petition which charged an absolute promise; that the court erred in admitting

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irrelevant evidence offered by plaintiff, and further erred in its declarations of law.

Touching the first assignment, we have to say that the petition, if properly framed, should have charged a conditional promise, as the promise shown by the proof was conditional, but that the evidence offered was at most a variance, as distinguished from a failure of proof. It could not operate as a surprise to the defendant, since the defendant, in its own answer, with minute details, set out the entire contract between itself and Heffernan, with all its conditions; and, where the answer thus supplements the petition, how can the defendant claim that the proof offered should not be received, it being strictly within the issues framed by the pleadings? *Carson v. Cummings*, 69 Mo. 325, cited by the defendant, holds that one cannot sue on a contract of sale, and then recover upon evidence of trover or conversion, and *Feurth v. Anderson*, 87 Mo. 354, likewise so cited, holds that one suing for the purchase price of certain articles cannot recover by showing a sale of other and wholly different articles. These are familiar cases, illustrating an entire failure of proof. Nor is an amendment allowed in such cases, because a party, even under the liberal provisions of our code, cannot substitute, by amendment, one cause of action for another. *Scovill v. Glasner*, 79 Mo. 449. Here the cause of action was the benefit certificate; the answer admits its issue to Martin C. Heffernan, and endeavors to avoid its effect by stating that the prompt payment of assessments was a condition precedent to his continuing a member in good standing; that he failed to pay assessments 153 and 154, and thereby became suspended, and that the benefit certificate became null and void. We are justified in holding, on the authority of *Mulroy v. Knights of Honor*, 28 Mo. App. 467, and cases there cited, that the defendant, by contesting its liability on the sole ground that the deceased was under valid suspension at the

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time of his death for failure to pay these assessments, has narrowed the issues to the trial of that fact.

Upon the trial, the plaintiff gave in evidence the benefit certificate, proved the death of Martin C. Heffernan, and that she was the beneficiary named in the certificate, and further proved that notice of death and preliminary proofs thereof were waived by the defendant. This, under the issues framed, was sufficient to make out a *prima facie* case, and the defendant's demurrer to the evidence was properly overruled.

The defendants introduced in evidence the application of Martin C. Heffernan for admission into the order, forming by its terms part of the contract between the parties, and containing among other things the following statement: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules and usages of the order, now in force or which hereafter may be adopted by the same." The defendant next offered in evidence the code of laws governing the order. It was admitted that assessments 153 and 154 were duly called on May 1, 1889, by the defendant corporation from the members of the council to which Heffernan belonged. It further appeared from these laws that the same calls are made at the same time on all subordinate councils. The following provisions of the laws have direct bearing on the matters in controversy:

"Sec. 6. Notice of all assessments levied shall be dated on the first day of the month, and whenever the condition of the supreme treasury shall make it necessary to call two assessments, the first shall be due on the first, and the second on the fifteenth day succeeding the date of the call."

"Sec. 8. The subordinate council having been notified by the supreme secretary that an assessment

has been laid, it shall be the duty of the collector to at once notify every member liable to an assessment. This assessment notice shall bear the official stamp of the collector, or the seal of the council, and shall be in accordance with a form prescribed by the supreme council, and its date shall be the same as that of the notice received from the supreme secretary. Each member shall pay the amount due on the notice of the collector within the time prescribed in section 6 of this law, and any member failing to pay such assessment within said time shall stand suspended from the order and all benefits therefrom. The collector shall immediately notify the commander and secretary of the date of such suspension, and the commander shall announce the suspension and the date thereof at the next meeting of the council.

"OFFICIAL SEAL AND STAMP.

"This council shall, within sixty days from the date of its institution, procure and adopt an official seal, an impression of which shall be deposited with the supreme and grand secretaries. After this council shall have been instituted sixty days, no document or paper issued by its authority shall be official, unless an impression of its seal is affixed thereto; provided, that the collector may have an official stamp, which may be affixed to all papers issued by said collector, instead of the seal."

The evidence tended to show the following facts: Martin C. Heffernan lived with his mother at 1924 Cass avenue, and his name and address were contained on the defendant's books. The plaintiff (the mother of Heffernan) and his sister were members of the same order, although members of different councils, and they usually paid Heffernan's assessments. For a long time anterior to the decease of Heffernan, who had been

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a member of the council for years, two assessments were called each month, and all assessments, except numbers 153 and 154, were duly paid, either by Heffernan, or by his mother or sister for him. Notice of all these assessments was given to the members of the council by mail, sometimes inclosed in an envelope, but mostly by postal cards, directed to their places of residence, but no notice ever sent contained either the official stamp of the collector, or the seal of the order. They all contained a mark of the emblems of the order, being a ten-pointed maltese cross with an angel in the center. The notices in controversy were in the following form:

{ EMBLEM. } "LAFAYETTE COUNCIL, NO. 392, A. L. OF H.,
May 1, 1889.

"*Companion:* You are hereby notified that assessments numbers 153 and 154 are now due and payable.

"H. C. ELBRECHT,
"Collector, 1823 Benton Street.

"If assessment number 153, amounting to forty-eight cents, is not paid on or before June 1, 1889, you stand suspended.

"If assessment number 154, amounting to forty-eight cents, is not paid on or before June 15, 1889, you stand suspended."

There was evidence tending to show that the postal card containing this notice was mailed in due time, directed to Martin C. Heffernan, 1924 Cass avenue, but a card, which purported to be the identical card, was produced by the plaintiff, when examined as a witness for defendant, bearing the government post stamp of May 4, and addressed to 1922 Cass avenue, presumably an adjoining house, and the plaintiff in that connection testified that she "got it under her door after the death of her son," which, as above stated, occurred June 28, 1889.

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This being in substance all the evidence that has any material bearing on the points of law arising on the record, the court at the instance of the defendant gave the following instruction:

"1. The court declares the law to be that, under the laws of the American Legion of Honor, no action of the council is required to perfect the suspension of a member, but that, by the failure to pay an assessment of which lawful notice has been given, within the time required by the laws of the order, such member by the mere fact of the non-payment stands suspended from the order, and, dying while so suspended, the beneficiary cannot recover on the benefit certificate of the member so suspended."

This instruction was a correct declaration of law, and we mention this fact merely because the plaintiff has argued the case here on the theory that not only the fact of suspension, which is worked by non-payment of dues, but also its announcement in council, as provided by section 6 above quoted, were essential to work a forfeiture of benefits, which theory is untenable.

The defendant asked the following declaration of law among others:

"8. The court declares the law to be that, if it finds from the evidence that at the time of his death Martin C. Heffernan had failed to pay to LaFayette Council of the American Legion of Honor any assessment or assessments, for which he was liable, within the time limited for the payment of the same by the laws of defendant's order, then said Martin C. Heffernan at the time of his death was not a member in good standing of said order, and plaintiff cannot recover."

The court declined to give the declaration in that form, but gave it, by adding thereto after the word "liable" the words, "and of which he had been duly notified according to the laws of the order." Other declarations of law asked by the defendant the court likewise modified, by requiring a notice according to

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the laws of the order, as a condition precedent to a valid suspension. What the court meant by these modifications, and how as a trier of the facts it understood the applicatory law, is best shown by the following extract from the opinion of the very careful judge, who tried this cause, such opinion being embodied in the record before us. After referring to the laws of the order requiring each subordinate council to have a seal, and providing that no document or paper shall be official unless an impression of its seal is affixed thereto, the court says: "These are positive requirements of the law, which not only could the subordinate council not change by custom or usage, but it has no authority to alter it even by a solemn enactment; for it is the law enacted by the supreme council for the government of the subordinate council. In this case the trier of facts would be justified from the evidence in finding that it was the uniform usage of the council to send these notices by mail addressed to the members at the numbers given in the book. And if the notice had been in a form prescribed by the supreme council, and under the seal of subordinate council, or the official stamp of the collector, I think the evidence would justify the finding that the member was duly notified."

We have set out the facts of this case thus fully, because we deem the proposition of law involved of vital importance to associations of this class, which furnish a safe mode of insurance to a vast number of people of limited means, and which depend for their usefulness almost exclusively upon an intelligent view and application of their peculiar laws. That rights of members once acquired should not be forfeited except for causes clearly within the contemplation of the contract, we concede. On the other hand, it is essential that the rights of the aggregate society should not be frittered away by matters purely technical. If the view entertained by the trial court is to prevail, any number of members, although not only aware of the fact that

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an assessment is payable, but also notified in due time in writing by the proper officers of the association of the time and place of payment required, and of the consequences of non-payment, may decline to pay all such assessments. Without giving the society any notice whatever of their ground of refusal, their beneficiaries may years afterwards in case of death recover out of a fund, to which the member has never contributed, simply because the notice was not under the seal of the order, or did not contain the collector's stamp. It must be borne in mind that, although in this instance the member died the same month in which he failed to pay these assessments, under the declaration of law made by the court the same result would follow, if he had died years afterward, and had paid no assessments whatever for years.

The trial court in its rulings relied upon *Siebert v. Supreme Council*, 23 Mo. App. 268, and *Stewart v. Supreme Council*, 36 Mo. App. 319. In the *Siebert case* there was no evidence of any service of the notice, and no evidence whatever of any waiver by usage or of custom as to the mode or form of notice prescribed. The naked question for decision was whether knowledge on part of a member, that an assessment had been laid, dispensed with proof of any notice, or in other words was conclusive evidence of notice. Judge LEWIS held that, upon these facts, a jury might infer that Mrs. Siebert did, or that she did not, receive the proper notice, without doing violence to the proofs, and that it is essential to our jury system, that jurors may adopt the most highly improbable of several hypotheses properly submitted to them, and yet their verdict must be judicially permitted to stand, however unsatisfactory to other minds,—thus deciding in effect that the jurors' failure to infer notice from knowledge was a finding against the weight of the evidence. In the *Stewart case*, we pointedly said that we cannot concede that, where the uniform usage of a society, with which all its

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members are familiar, has given to the word "notify" a different meaning, personal notice is still indispensable. We also held in that case that there was evidence tending to show that the uniform usage of the society and its members dispensed with personal notice, and the weight of that evidence was a question for the jury. There was evidence tending to show a waiver on the part of Hugh Stewart of personal notice, and that question was one for the jury, as the contract was solely between him and the association. We are aware of no principle, which would enable us to distinguish between a waiver of the mode of service, and a waiver of the form of notice.

Now, in the case at bar, the testimony is uncontradicted that none of the notices ever given to any member of this council were in strict compliance with the laws of the order, in this, that none of them were either under the seal of the council or contained the collector's stamp, and it is equally uncontradicted that all the members not only of this council, but also of other councils belonging to the order, including the beneficiary herself, did for years treat these notices, as the notices and the only notices to which they were entitled, although they presumably knew that the laws of the order required a notice under seal, so that there was ample evidence of a question of waiver, and the court erred by withdrawing from its own consideration that question, as appears by its declaration of law.

If the court as a trier of the facts had found that no timely notice of any sort was given to Martin C. Heffernan of these two assessments, we would not be justified in disturbing its verdict; nor can we on the other hand sustain the verdict, because in our opinion the weight of the evidence is to that effect, since we cannot make a finding of facts upon conflicting evidence, and thereby usurp the province of the jury.

The views herein expressed lead to a reversal of the judgment. In remanding the case we may add that

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evidence of a custom to induce suspended members to apply for reinstatement was irrelevant to the issues of this case, and should on the retrial be excluded. The same observation is applicable to the testimony of witness Elbrecht, touching a conversation between himself and one Sloan, which was mere hearsay. The admission of irrelevant evidence may have no effect whatever, when the cause is tried by the court, but may become highly prejudicial, when it is tried before a jury.

Reversed and remanded. All the judges concur.

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DANIEL W. CLIFTON *et al.*, Appellants, v. JOHN ANDERSON, Respondent.

St. Louis Court of Appeals, April 15, 1890.

1. **Parties: ACTION TO CHARGE MARRIED WOMAN'S SEPARATE ESTATE.** If a married woman die pending an action in equity to charge her separate estate in realty, the suit can only proceed against those who succeed to her title; and her administrator is not a necessary or proper party.

2. **——: ——: JUDGMENT.** If only her administrator is made a party defendant, the judgment will be void, and though the person acting and made a party as administrator succeed as an individual to a portion of the married woman's title, as if he be tenant by the curtesy, such interest as an individual will not be bound by the judgment.

3. **Injunction: SALE UNDER VOID JUDGMENT.** The sale of the land under such void judgment may be restrained by injunction at the instance of those succeeding to the title.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

REVERSED AND REMANDED.

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Geo. R. Lockwood, for the appellants.

Mrs. Clifton did not have a separate estate in the property described. *Turner v. Shaw*, 96 Mo. 22; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Schafroth v. Ambs*, 46 Mo. 518; *Paul v. Leavitt*, 53 Mo. 595; *Nicholson v. Flynn*, 24 Mo. App. 574; *Edwards v. Burns*, 26 Mo. App. 44; *Bank v. Collins*, 75 Mo. 280. The property not being the separate estate of Mrs. Clifton, she did not charge it by borrowing the money from defendant, if she did borrow it. *Bank v. Collins*, 75 Mo. 280; *Claflin v. Wagoner*, 32 Mo. 252; *Arnold v. Brockenbrough*, 29 Mo. App. 638; *Mueller v. Kaessmann*, 84 Mo. 323. The decree is, and the sale, if ordered by the probate court, will be, a cloud on the title of plaintiffs, such as will be removed by equity. *Bank v. Evans*, 51 Mo. 335; *Clark v. Ins. Co.*, 52 Mo. 272; *Mason v. Black*, 87 Mo. 329; *Lick v. Ray*, 43 Cal. 83. A court of equity has jurisdiction to prevent a cloud upon a title as well as to remove one, and, therefore, it will enjoin a sale or the other proceedings that will create a cloud. *Church v. Hintze*, 72 Mo. 363; *Groves v. Weber*, 72 Mo. 607; *Harrington v. Utterback*, 57 Mo. 519; *Vogler v. Montgomery*, 54 Mo. 577. D. W, Clifton is a victim of misplaced confidence, or he and defendant were mutually mistaken as to Sarah Clifton having a separate estate in the property in question, and in either case equity will grant relief. *Nelson v. Betts*, 21 Mo. App. 229; *Blair v. Railroad*, 89 Mo. 383, 393; Bispham's Eq., secs. 185–188, 214; Story's Eq., secs. 192, 384, 394; *Smith v. Richards*, 13 Pet. 26; *Taymond v. Mitchell*, 1 Md. Ch. 496; *Bankhead v. Alloway*, 6 Cald. 75; *Pothill v. Walter*, 3 B. & A. 114; *Hazard v. Irwin*, 18 Pick. 95; *Stone v. Denny*, 4 Metc. 151; Kerr on Fraud & Mistake, 54, 149; Bigelow on Fraud, 56, 468; *Griffith v. Townley*, 69 Mo. 16, 17.

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S. S. Merrill and *E. J. O'Brien*, for the respondent.

The petition fails to state a case for an interference by a court of equity by means of an injunction, since the parties have an adequate remedy at law. 1 High on Inj. [2 Ed.] sec. 230; *Stockton v. Ransom*, 60 Mo. 535. The plaintiffs can avail themselves of all the rights they claim in this suit in the proceedings for an order of sale of this property. *Callahan v. Griswold*, 9 Mo. 784; *Fenix v. Fenix*, 80 Mo. 27, 33. Ignorance of the law being no defense, Daniel W. Clifton is conclusively bound by the decree of the circuit court, if no fraud was practiced on him. Having been heard as administrator, he cannot now come in and claim, as heir, a right to have the matter relitigated. *Stewart v. Montgomery*, 23 Pa. St. 410; *Boykin v. Cook*, 61 Ala. 473. Before a court of equity will enjoin a judgment regular on its face, "the plaintiff must aver and of course prove some injustice in the judgment he seeks to enjoin." *Sauer v. City of Kansas*, 69 Mo. 46, 49; 2 Story's Eq. [13 Ed.] sec. 898, and note *b*; *George v. Tutt*, 36 Mo. 141; *Duncan v. Gibson*, 45 Mo. 352; *Davis v. Staples*, 45 Mo. 570; *Piggott v. Addicks*, 3 G. Greene, 428; *Stokes v. Knarr*, 11 Wis. 389, 391; *Taggart v. Wood*, 20 Iowa, 236. Plaintiffs have shown no injustice in this judgment. This land was Sarah Clifton's separate property. It was bought with her separate property. The money given her was her separate property. *Gabriel v. Mullen*, 30 Mo. App. 464, 467; *Blair v. Railroad*, 89 Mo. 383, 391; *Broughton v. Brand*, 94 Mo. 169, 174. The proceeds of the land given her were her separate property. *Houx v. Shaw*, 25 Mo. App. 233, 236; *Rodgers v. Bank*, 69 Mo. 560; *Gilliland v. Gilliland*, 96 Mo. 522; *Klenke v. Koeltze*, 75 Mo. 239; *Martin v. Colburn*, 88 Mo. 229; *Edwards v. Burns*, 26 Mo. App. 44; *Boston v. Murray*, 94 Mo. 175. This land was subject to defendant's claim regardless of

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whether it was a separate estate or not, because he advanced money to pay off a mortgage on it, at the request of the debtor, Sarah Clifton, with an agreement for a new mortgage, and the money was so applied. Equity subrogates Anderson to the rights of the first mortgagee. *Norton v. Highleyman*, 88 Mo. 621, 624; *Johnson v. Goldsby*, 32 Mo. App. 560, 564; *Evans v. Halleck*, 83 Mo. 376, 379; *Wolf v. Walter*, 56 Mo. 292, 295; *Crippen v. Chappel*, 35 Kan. 495, 499; *Bolman v. Lohman*, 74 Ala. 507, 511, 512; 1 Jones on Mort. [4 Ed.] sec. 874*a*; 3 Pom. Eq. Juris. (1883) sec. 1212; *Bank v. Thompson*, 32 N. J. Eq. 133.

BIGGS, J., delivered the opinion of the court.

The plaintiff Daniel W. Clifton was the husband, and his co-plaintiffs are the children and only heirs-at-law, of Sarah Clifton, deceased, and as such they instituted this action in equity to cancel and annul the following judgment or decree of the circuit court of the city of St. Louis, rendered on the twenty-first day of December, 1886, to-wit:

"John Anderson
v.
"Daniel W. Clifton, Administrator of Sarah Clifton, deceased. } Number 72377.

"Come now at this day the said parties by their respective attorneys and submit this cause to the court upon the petition and agreed statement of facts therein contained, and the court, having heard the same and being fully advised of and concerning the premises, doth now find the estate of said Sarah Clifton to be indebted to the plaintiff John Anderson in the sum of five hundred and thirty-two and fifty-hundredths dollars, for money loaned the said Sarah Clifton during her lifetime, and that the same is a special lien upon the property in the petition described as following, to-wit: Lot number 31 of block number 4 of South Stoddard addition, according to an amended plat

thereof on record in the office of the recorder of deeds for said city of St. Louis, Missouri, said lot having a front on the south line of Laclede avenue in said city of twenty-five feet by a depth of one hundred and thirty feet to Garrison Court street, it being the same property conveyed by one Samuel M. Smith and wife to said Sarah Clifton, deceased, by deed of warranty dated November 1, 1883. Wherefore it is adjudged and decreed by the court that plaintiff recover said sum of the estate of said Sarah Clifton in hands of Daniel W. Clifton, administrator, the same to be levied of the property charged with the lien thereof, and herein before described, and his costs and charges herein expended, and that the clerk of this court do certify this judgment to the probate court."

The agreed statement of facts mentioned in the decree was signed by John Anderson and Daniel W. Clifton, administrator of Sarah Clifton, deceased, and it was to this effect: That Sarah Clifton was the wife of Daniel W. Clifton, and that the former acquired the real estate mentioned in the decree during her coverture, and that she held it as her separate property; that the property was incumbered by her for a part of the purchase money, and that, for the purpose of fully paying this incumbrance, she borrowed of her brother, John Anderson, the sum of five hundred dollars, and that, at the time the money was loaned, she agreed to give him a deed of trust on the real estate to secure the same, but that she was prevented from so doing on account of her death a short time thereafter.

The plaintiffs averred that they were in possession of the land in controversy; that the deed, by which the property was conveyed to Sarah Clifton, vested in her an ordinary estate only; that, upon her death, Daniel W. Clifton became entitled to the possession thereof as tenant by the curtesy, and his children, the other plaintiffs, were the owners of the fee, subject to his life-estate; that the plaintiffs were, at the date of the

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institution of the suit in the actual occupancy of the property; that D. W. Clifton, in signing the agreed statement of facts, did not know the nature of his wife's title, and relied entirely on the representation of the attorney of John Anderson in reference thereto; that the defendant was about to have the property sold under the decree, and that such a sale would cast a cloud on the title of the plaintiffs.

Upon this statement of facts the plaintiffs claimed that, as to them, the decree of the circuit court subjecting the aforesaid real estate to the payment of the alleged debt from Mrs. Clifton to the defendant was inoperative, and they prayed that it be set aside and held for naught, and that the defendant be restrained from enforcing or attempting to enforce the same.

The answer of the defendant was in effect a general denial. The cause was submitted to the court, and a final judgment was entered against the plaintiffs. From this judgment the plaintiffs have prosecuted this appeal.

The nature of Mrs. Clifton's title, the circumstances under which Daniel W. Clifton signed the agreed statement of facts, the legal effect of the admissions therein by him, and the validity of the decree based thereon, seem to have constituted the chief matters of dispute on the trial.

On the first day of November, 1883, Mrs. Clifton purchased the property from one Samuel M. Smith, and it is conceded that the deed from Smith upon its face vested in Mrs. Clifton an ordinary estate, and contained no words, which, either expressly or by fair implication, could be so construed as to render the estate conveyed the sole and separate estate of the wife. But notwithstanding this the defendant claims that the property conveyed must in equity be regarded as the separate property of Mrs. Clifton, because it was paid for with money received by her as a gift at and subsequent to the purchase, and that the money so received by her was, under the laws of this state, her sole and

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separate property; therefore, the defendant insists that Mrs. Clifton, by reason of the fact that she borrowed the money from him for the benefit of her separate property, created a charge on it in his favor for the amount so loaned, and that, for this reason, the judgment, sought to be set aside in this proceeding, ought to be upheld. The defendant also endeavors to sustain the decree for the sale of the land upon the further ground that the money borrowed from him was used by Mrs. Clifton in discharging a valid and subsisting mortgage on the property, and that a court of equity would subrogate him to the rights of the holder of this mortgage.

Under the view which we have taken of this case it will not be necessary or proper for us, for want of the necessary parties to the first decree, to determine the character of Mrs. Clifton's estate in the land in controversy. For the purposes of this appeal, all that the defendant claims may be conceded, yet, under the decisions of this court and the supreme court (*Boatmen's Savings Bank v. McMenamy*, 35 Mo. App. 198, and *Davis v. Smith*, 75 Mo. 219), the decree charging the land with the payment of the defendant's debt must be held to be invalid, because Mrs. Clifton died intestate, and her children were not made parties. In both cases it was flatly decided that, when a married woman dies seized of separate realty which is sought to be charged with her obligations, her personal representative is not a proper party; that the cause of action is not a personal one against the wife, and does not survive against her personal representative, but that it is against the land alone and that her heirs are the only necessary or proper parties. It, therefore, follows that Daniel W. Clifton, as administrator of his wife, or as an individual, was not a necessary or proper party, and that the decree, rendered against him in his representative capacity, could, in no way, prejudice his individual

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interest as a tenant by the curtesy, or that of his children, as the owners of the title. That he possessed an estate by the curtesy in the real estate cannot be questioned (*Tremmel v. Kleiboldt*, 75 Mo. 255), and this interest could not be made subordinate to the alleged equitable claim of the plaintiff by the admissions made by him in the agreed statement of facts. Nothing short of an express agreement to waive his right of curtesy in favor of the defendant's claim could accomplish such a result. Therefore, it cannot be successfully maintained that he or his children are concluded by the terms of the decree, or in any manner estopped by admissions made by him as the personal representative of his wife.

Whether the first decree can be upheld on the theory, that it was in effect a subrogation of the defendant to the rights of the mortgagee to the extent of the money furnished by him (defendant) towards the discharge of the mortgage debt, cannot be considered by us in support of the present decree for two reasons: *First.* The circuit court, in rendering the first decree, did not proceed upon any such theory. *Second.* The children of Mrs. Clifton would be necessary parties in such a proceeding.

Having reached the conclusion that the decree sought to be annulled by the plaintiffs is invalid, the only remaining question for our determination is the right of a court of equity to interfere. The defendant insists that the remedy at law is adequate, and that for this reason the plaintiffs have improperly invoked the aid of a court of chancery. The right or power of a court of chancery to prevent a sale, which, in its effect, would cast a cloud upon the title to real estate, is no longer an open question in this state. *Gardner v. Terry*, 99 Mo. 523; *Parks v. Bank*, 31 Mo. App. 12; *McPike v. Pew*, 51 Mo. 63; *Martin v. Jones*, 72 Mo. 24; *Vogler v. Montgomery*, 54 Mo. 577; *Harrington v. Utterback*, 57 Mo. 519; *State v. Tiedemann*, 69 Mo. 306.

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Although the sale sought to be enforced would convey no title, and the parties seeking the injunction might be able to defend themselves against the result of the sale by legal proceedings, yet the true policy of the law is to prevent the void act, and thereby avoid a multiplicity of suits springing out of it. That the plaintiffs in this action would be able to defend their possessory right to the property against a purchaser at a sale under the defendant's decree may be true, yet the invalidity of such a sale could only be made to appear by matters outside of the record, and, until this fact should be established, the plaintiffs' title would be discredited and material damage might result on account of it. To prevent this injustice and annoyance, a court of chancery will, and ought to, interpose and arrest the wrong in its incipiency.

We are of the opinion that the first decree of the circuit court, making the defendant's debt a charge upon the property mentioned therein, was unwarranted, and, therefore, the judgment in the present action must be reversed. As, however, under the facts of the case, the defendant appears to have a meritorious claim which he can assert and may possibly establish by cross-bill for subrogation, or the establishment of an equitable lien in this action, provided he shows that the property was the separate estate of Sarah Clifton, we will not dismiss the bill, but remand the cause for further proceedings.

Reversed and remanded. All the judges concur.

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JOHN C. NEAREN *et al.*, Respondents, v. JUDITH I. BAKEWELL *et al.*, Appellants.

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St. Louis Court of Appeals, April 15, 1890.

Appeals: jurisdiction. An action to rescind the sale and conveyance of land from the defendants to the plaintiffs on the ground of fraud, and to cancel a deed of trust and notes given for the purchase money by the plaintiffs to the defendants, especially if it is instituted after breach of the conditions of such deed of trust, involves title to land; and the supreme court alone has jurisdiction of an appeal in such cause.

Appeal from the Jefferson Circuit Court.—HON. JOHN L. THOMAS, Judge.

TRANSFERRED TO THE SUPREME COURT.

Thomas & Horine, for the appellants.

Jos. J. Williams, for the respondents.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action to rescind a sale of eighty acres of land, to reinvest the defendants with the title thereto, and to compel them to give up for cancellation ten promissory notes, part of the purchase money, and a deed of trust to secure the same, given by the plaintiffs to the defendants. The ground on which the contract is sought to be rescinded is fraud in the sale.

The first question which we are bound to determine is our own jurisdiction of the appeal. That jurisdiction depends on the proposition as to whether the action is one involving title to real estate within the meaning of the term as used in the constitution. The supreme court has impliedly decided in *Springer v. Kleinsorge*, 83 Mo. 155, that an action to recover from a bidder

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at auction the purchase price of the land, where the defense was fraudulent by-bidding, was an action involving the title to real estate. Although the amount in that case involved less than twenty-five hundred dollars, this court granted an appeal to the supreme court on the sole ground that it involved title to real estate, and the latter court retained jurisdiction. In *Isaacs v. Skrainka*, 18 Mo. App. 323, the action was for specific performance and the amount of the purchase money was less than twenty-five hundred dollars. This court transferred the case to the supreme court, holding that it involved title to real estate, and the supreme court retained and decided it. *Isaacs v. Skrainka*, 95 Mo. 517.

There can be no difference in principle between actions enforcing, and those avoiding, the sale of real estate, as far as they both bear upon the question of title to real estate. *Springer v. Kleinsorge*, *supra*, was of the latter class, and *Isaacs v. Skrainka*, *supra*, of the former. The supreme court necessarily decided in both that they involved title to real estate. We might also refer to *Baier v. Berberich*, 77 Mo. 413, where it was held that a suit seeking a divestiture of title out of A. into B. on the ground of trust was a case involving a title to real estate, and to *Dunn v. Miller*, 18 Mo. App. 136; s. c., 96 Mo. 324, where it was held that a suit, seeking to cancel a forged deed and to annul a judgment in ejectment based thereon, was likewise an action involving title to real estate.

The nature of the present action is twofold. It seeks to enjoin a sale, to compel the cancellation of certain notes, to divest the defendants' title under the deed of trust, and to avoid the plaintiffs' title under the defendants' deed to them. As it is admitted by the evidence that the action was brought after condition broken, the defendants under the decisions in this state held the legal title under the deed of trust, as distinguished from a mere lien. *Johnson v. Houston*, 47

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Mo. 227. Hence, the action involves title to real estate in either aspect of the case, and the supreme court has exclusive jurisdiction of the appeal.

It is ordered that the record in this case, with a certified copy of this order of transfer, be at once sent to the supreme court. All the judges concur.

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THE STATE OF MISSOURI, Respondent, v. LUKE F. QUINN, Appellant.

St. Louis Court of Appeals, April 15, 1890.

1. **Criminal Law: BILL OF EXCEPTIONS. Exceptions to the action of the trial court on motions in a criminal case for a bill of particulars, and to quash the indictment, are waived, unless preserved in the motion for new trial.**

2. **——— : BILL OF PARTICULARS. The practice of demanding a bill of particulars in a criminal case has never prevailed in this state.**

3. **——— : DRUGGISTS : SALE OF INTOXICATING LIQUOR. Evidence that the defendant was a registered druggist, and that a merchant's license for drugs was issued to him, though such license did not contain the given name of the defendant, is sufficient evidence of the occupation of the defendant as druggist within the purview of section 2 of the act of March 29, 1883, concerning the sale of intoxicating liquors by druggists, and the statute of which it is amendatory.**

4. **——— : ——— : ———. A sale of whiskey at the drugstore of defendant by a person, then in charge of such store and attending to the defendant's business, *prima facie*, establishes a sale by the defendant within the meaning of said section 2.**

Appeal from the Butler Circuit Court.—HON. JOHN G. WEAR, Judge.

AFFIRMED.

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L. D. Grove, for the appellant.

(1) The allegations of the indictment will not warrant a judgment, and the motion in arrest should have been sustained; the theory of the indictment being that the druggist must procure prescription from some regular practicing physician—not that the purchaser should procure the same. (2) The motion for bill of particulars should have been sustained; while such orders are very much in the discretion of the court, that discretion will be reviewed and it will be held error if such discretion deprives persons charged with crime of substantial rights. *Commonwealth v. Davis*, 11 Pick. 424; *State v. Chitty*, 1 Bailey, 379; 1 Bishop Crim. Proc. 107–8, 643–6; *Commonwealth v. Wood*, 4 Gray, 11; *Commonwealth v. Giles*, 1 Gray, 411. The court erred in not hearing the proof to quash the motion, as the same was competent, and, if found true, the indictment should have been quashed. *State v. Grady*, 84 Mo. 220. The first instruction is erroneous in charging that simply being registered as a druggist makes him liable—ignoring the necessity of being a merchant as well. *State v. Marchand*, 25 Mo. App. 657. Also, in charging the presumption of no prescription. 1 Greenleaf Ev. [14 Ed.] secs. 78, 79, 80; *State v. Hirsch*, 45 Mo. 429. The third instruction is erroneous in that it is not predicated upon the evidence, and in that it does not charge that defendant should have been a druggist within the meaning of the law. *State v. Marchand*, 25 Mo. App. 657; 1 Greenleaf Ev., secs. 78, 79, 80; *State v. Hirsch*, 45 Mo. 429.

R. F. Scott, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

The defendant was indicted in November, 1888, for selling intoxicating liquor as a druggist without a

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written prescription from a registered physician. The indictment was preferred under section 2 of the act of March 29, 1883 (Laws, 1883, p. 90), which reads as follows:

"No druggist or pharmacist shall, directly or indirectly, sell, give away or otherwise dispose of intoxicating liquors of any kind in any quantity less than one gallon, for any purpose, except on a written prescription, dated and signed, first had and obtained from some regularly registered and practicing physician, and then only when such physician shall state in such prescription the name of the person for whom the same is prescribed, and that such intoxicating liquor is prescribed as a necessary remedy; provided, that any druggist or pharmacist may sell or give away, in good faith, any wine for sacramental purposes. Any druggist who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall, for the first offense, be fined not less than one hundred nor more than five hundred dollars, and for a second offense shall, on conviction, in addition to such fine, have his license as a pharmacist revoked."

The indictment is in proper form, and charges the offense as having been committed on the twenty-first of October, 1883. The defendant moved for a bill of particulars, which the court denied. He then moved to quash the indictment upon the ground, among others, that the indictment was found and returned by the grand jury without any evidence showing or tending to show that the defendant was guilty of the offense charged.

In support of the motion defendant offered to prove by the prosecuting attorney that the grand jury had no proof whatever before them that the defendant was a registered druggist and pharmacist. The court would not permit him to do so, and the defendant excepted.

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At the close of the case for the state the defendant demurred to the evidence, and, his demurrer being overruled, he offered no evidence himself, but excepted to the instructions given on behalf of the state. The trial resulted in the defendant's conviction, and he now assigns for error the rulings of the court hereinabove set out. In regard to the exceptions touching the court's refusal to sustain the motion for a bill of particulars, and touching the action of the court in refusing to hear evidence in support of the motion to quash, we need only say that these exceptions are not preserved in the motion for new trial and hence are waived. There seems to be no difference in that respect between civil and criminal cases. *State v. Dunn*, 73 Mo. 586; *State v. Robinson*, 79 Mo. 66. We will add, however, that the practice of demanding a bill of particulars in criminal cases, which is established in some states, has never prevailed in this state, and that the case of *State v. Grady*, 84 Mo. 220, merely decides that an indictment found by the grand jury without hearing any evidence whatever may be quashed on motion, and not as defendant's counsel conceives that an indictment may be thus quashed by a mere showing that it was found by the grand jury upon insufficient evidence.

The evidence upon the trial tended to show that a glass of whiskey was sold to a person at the defendant's drugstore in the town of Poplar Bluff by a person then in charge of such store and attending to the defendant's business, and that this sale was made without any prescription from any one. It was admitted that the defendant was a registered druggist, and it was shown that a merchant's license for drugs was issued to Quinn, at Poplar Bluff, for a period covering the date of this sale. The license did not contain the given name of Quinn. We think this proof was sufficient to make a *prima facie* case for the state. It constituted the defendant a druggist within the definition of the section above quoted, and of the statute whereof it is

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amendatory (*State v. Marchand*, 25 Mo. App. 657), and was *prima facie* evidence at least that the sale was made by the defendant's authority. *Casey v. The State*, 6 Mo. 646; *Town of Kirkwood v. Autenreith*, 21 Mo. App. 73.

We have carefully examined the instructions and find nothing in them of which the defendant can justly complain.

The judgment is affirmed. All the judges concur.

TOWN OF KIRKWOOD, Respondent, v. JOHN G. CAIRNS *et al.*, Appellants. 40 631 / 59 315 / 40 631 / 62 13

St. Louis Court of Appeals, April 22, 1890.

Practice, Appellate: FILING TRANSCRIPT. An order of the trial court extending the time for the filing of the bill of exceptions beyond the time allowed appellant for the filing of the transcript in this court is, *prima facie*, good cause for the failure of the appellant to duly file such transcript; but such order is not conclusive, and, if it is affirmatively shown to have been unnecessary and unwarranted, it will not constitute such good cause.

Appeal from the St. Louis County Circuit Court.—HON. W. W. EDWARDS, Judge.

MOTION FOR REHEARING SUSTAINED.

ROMBAUER, P. J., delivered the opinion of the court.

The respondent produced a certificate of the circuit clerk, from which it appeared that judgment was rendered herein for the plaintiff in the circuit court on November 30, 1889, and that the defendants took an appeal therefrom on February 1, 1890. No transcript of the record was ever filed in the office of the clerk of this court, and, the appeal having been taken more than thirty days before the present term of this court, the

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respondent moves for an affirmance of the judgment under the provisions of section 2252 of the Revised Statutes of 1889.

The respondent supports the motion by affidavits, showing that it employed an official stenographer at the trial; that the testimony taken at the trial could have been readily transcribed in six days; and that it tendered to the appellant the evidence thus taken, and offered to have the same transcribed, if appellants so desired, at the respondent's own cost, to be used as the testimony to be embodied in the bill of exceptions; also by an affidavit tending to show that no complete bill of exceptions has been filed in the cause up to the present date.

The appellants filed an affidavit in opposition to the motion, stating in substance that their motion for new trial was overruled February 1, 1890, which was the last day of the term of the circuit court, and that they thereupon on said day took an appeal, the court entering an order upon its records, granting them leave to file their bill of exceptions fifteen days thereafter; that before the expiration of such fifteen days, the judge of the circuit for good cause shown, under the provisions of section 2168 of the Revised Statutes of 1889, extended the time for the filing their bill of exceptions for twenty additional days, and that they did file their bill of exceptions within the time thus granted, to-wit, on or about March 9, 1890, which was after the beginning of the present term of this court. The affidavit filed by appellants relies exclusively on these successive extensions as good cause why the judgment should not be affirmed.

Upon the facts thus shown, we affirmed the judgment of the trial court, assigning in substance the following reasons for our action:

Sections 2252 and 2253 of the Revised Statutes of 1889 provide that an appeal, taken thirty days before the first day of the next term of the appellate court to

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which the appeal lies, shall be returned to such next term, and that the appellant shall, within fifteen days before the first day of such term, file in the appellate court a perfect transcript of the record or proceedings, or, in lieu of such transcript, a record entry of the judgment below and the order of appeal, and, at such time thereafter as the appellate court may direct, a printed abstract of the entire record. These provisions are mandatory; they refer to the time of taking the appeal, and not to the time of signing and filing of the bill of exceptions, and the circuit court or its judges cannot set them aside arbitrarily, by extensions of time to file the bill of exceptions. An appellant, who asks for extended time to file his bill of exceptions and obtains it, is not thereby relieved from his obligations to file the record and transcript in the appellate court within the time required by the statute, unless good and satisfactory reasons exist for such extension. If the appellant wants to show good cause why the judgment should not be affirmed for failure to prosecute his appeal, he must satisfy the appellate court that he could not, by the use of reasonable diligence, have filed a complete transcript, or record and printed abstract, as the case may be, in the appellate court within the time required by law, and he fails to do this conclusively by simply showing that successive extensions of time to file his bill of exceptions have been granted to him by the trial court or its judge, but without showing, at the same time, that such extensions were necessary.

When, therefore, the appellant shows no other cause why his transcript was not filed to the return term, than that he obtained successive extensions of time from the trial court or its judge in vacation to file a bill of exceptions, and the respondent satisfies us that such extensions were wholly unnecessary, we ought not to treat the extensions as good cause in themselves, and are warranted in affirming the judgment. To that ruling we still adhere.

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Since we affirmed the judgment, the appellant has filed a motion for rehearing, supported by numerous affidavits. These affidavits tend to show that the successive extensions of time to file a bill of exceptions were fairly warranted by the circumstances, and that the fact, that they were so warranted, was not shown to us by counter affidavits when the motion to affirm was pending, because appellants' counsel believed in good faith that the action of the trial judge in granting these successive extensions would be taken as conclusive evidence that the extensions were granted upon a showing of their necessity.

As this is the first case calling for a construction of the present law on that subject, and as the question is one admitting of an honest difference of opinion, we will sustain the motion for rehearing, and set aside the judgment of affirmance. At the same time, as it is important that the rule on this subject should be uniform, for the guidance of the bar and trial judges, we will briefly restate our views on the subject. The discretion of the trial court, or of its judge in vacation, to grant extensions of time for the filing of a bill of exceptions, is not an arbitrary but a judicial discretion, and, as such, subject to review in the appellate court. Were the rule otherwise, it would be in the power of the trial courts to prevent appeals from their judgments ever being heard, by indefinitely granting such extensions. *Prima facie*, the extension is presumed to be granted for sufficient cause, upon the presumption which upholds the validity of the orders and judgments of all courts. But, when it is affirmatively shown to us that the extension of time was unnecessary and unwarranted, it is incumbent upon the appellant to show that it was warranted, or otherwise suffer the penalty which the statute attaches to his negligence.

All the judges concurring, the appellants' motion for rehearing is sustained, and the judgment of affirmance entered herein on April 1, 1890, is set aside.

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47	270
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56	330
40	635
57	25

The State of Missouri to use of Chris. Nieman, Respondent, v. Wm. F. Koch *et al.*, Appellants.

St. Louis Court of Appeals, April 22, 1890.

1. **Evidence:** DEBTOR AND CREDITOR. Parol evidence is not admissible as between a debtor and an attaching creditor to show that an absolute bill of sale, given by the former to a third person for personal property levied upon, was in fact given as security for indebtedness to such third person.

2. **Exemptions:** FRAUDULENT CONVEYANCES. If personal property be sold to defraud creditors of the vendor and be thereafter levied upon by such creditors, the vendor is not entitled to claim the same as exempt, if it was not of a kind specifically exempted by statute, and if it is not affirmatively shown that it constituted all the property owned by the debtor at the time of sale, and that it was exempt because less than three hundred dollars in value.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel Dillon, Judge.

Reversed and remanded.

Haeussler & Hezel, for the appellants.

Christian & Wind, for the respondent.

Rombauer, P. J., delivered the opinion of the court.

An opinion was filed in this cause April 1, 1890, and a judgment entered reversing the judgment of the trial court, and remanding the cause for new trial. Since the opinion was filed, counsel for the respondent has filed a motion for rehearing, in which, with more zeal than discretion, he criticises our discussion of the law and facts of the case. As some of the questions arising upon the record have never been directly passed upon by any court of final judicature in this state, we have concluded to file this opinion in lieu of our original

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opinion in the cause, and thus dispose at once of all points made by the respondent, both in his original brief, and in his brief upon the motion for rehearing.

The action is one against a constable and the sureties on his official bond for a wrongful sale of plaintiff's goods, which the plaintiff claimed were exempt from levy and sale. The answer states that the property, levied on and sold, was not property specifically exempt by statute, and had been prior to the levy and sale conveyed by the plaintiff in fraud of his creditors, and that the plaintiff, at the time of the levy and at all times thereafter, denied that he was the owner of the property.

The plaintiff recovered judgment in the trial court for the value of the property sold by the constable. The defendants assign for error that the court admitted illegal evidence against them, and erred in its instructions to the jury.

The property in controversy consisted of a stock of groceries, worth about three hundred dollars, which was contained in a store run by plaintiff. It did not appear whether it was all the property owned by the plaintiff or not. The plaintiff was the head of a family. He testified that he was not in the store when the levy was made, but that subsequently he went to the constable with his attorney and claimed the goods as exempt from attachment. On cross-examination the plaintiff admitted that he told the constable prior to this claim that he had made a bill of sale of these groceries to one Rupenthal, but that he did not remember whether he told the constable at the same time that he could not claim any exemptions in the goods, as they were not his. Neither did the plaintiff remember whether he had sworn on a former trial of the cause that he did not own the goods at the date of the levy, and, therefore, could not claim any exemptions.

The court did not permit the plaintiff on his cross-examination to state the contents of the bill of sale,

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but, on his re-examination, it permitted the following questions to be put to him by his counsel:

"*Q.* What passed between you and Rupenthal?" To which the plaintiff answered: "Well, I gave Rupenthal a bill of sale because I owed him a little bill, to secure himself.

"*Q.* How much did you owe Rupenthal?" To which the plaintiff answered: "I owed Rupenthal twenty-five dollars.

"*Q.* Was the amount the only consideration paid you for this paper?" To which plaintiff answered, "Yes, sir."

The plaintiff's counsel testified that, prior to the sale, he gave to the constable a written notice on behalf of the plaintiff, stating that the plaintiff was the head of a family, and, as such, entitled to exemptions under sections 2343 and 2346 of the statutes, and demanded that the same be set aside to him; that the constable looked over the paper and said: "He is not entitled to anything, he has sold it;" and that he, the counsel, thereupon replied: "I know all about that sale, it don't amount to anything; you know, yourself, that the sale don't amount to anything; what we claim is that this property is exempt from execution, and demand that it be set aside to him." There never was any delivery to Rupenthal, or change of possession, nor did it appear that the paper given to Rupenthal was ever recorded. This, and evidence showing the value of the property, was all the evidence adduced by plaintiff, whereupon the defendants, by instruction, demurred to the evidence, and, upon the court refusing the instruction, gave evidence tending to show the facts stated in their answer.

The court erred in permitting the plaintiff to give oral evidence of the contents of the bill of sale, and evidence of what its consideration was; but, even if all this testimony had been properly admitted, we

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still think the defendant's demurrer to the evidence should have been sustained, as plaintiff's own evidence does show that he had parted with the title to the goods prior to the levy, and does not show, as plaintiff's counsel argues, that he was a mortgagor in possession. Assuming that such a fact could be shown, this court has, in effect, decided that, although a sale of personalty, which is in fraud of creditors, may be avoided by the creditors of the vendor, yet the vendor himself cannot avoid it for the purpose of claiming the statutory exemption in such personalty. *Alt v. Bank*, 9 Mo. App. 91. That proposition was decided on full consideration, and there is no decision in this state which militates against it. Where property is either specifically exempt by statute, or has, by claim duly made, acquired the status of exempt property, there can be no conveyance of it in fraud of creditors. That was expressly decided in *Kulage v. Schueler*, 7 Mo. App. 250, and reiterated in *Weinrich v. Koelling*, 21 Mo. App. 133, 135, and *Stotesbury v. Kirtland*, 35 Mo. App. 157. The same position is taken in *Hombs v. Corbin*, by the Kansas City Court of Appeals, on the second appeal of that case, 34 Mo. App. 393. The cases which hold that property exempt as a homestead cannot be conveyed in fraud of creditors rest on the same principle, because the homestead is specifically exempt. *Vogler v. Montgomery*, 54 Mo. 577; *State ex rel. v. Diveling*, 66 Mo. 375; *Davis v. Land*, 88 Mo. 436.

In the case at bar, the property was not specifically exempt. Under the cases above cited, the plaintiff might have claimed it after it was levied on, if it was still his property, and, after making such claim, might have sold it as exempt property; but, before the claim, it was subject to levy, as all other property of the plaintiff not specifically exempt. The mere fact that the sale to Rupenthal was fraudulent as against the creditors of the plaintiff did not put the plaintiff in a

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position to avoid that sale, and claim the property as his own. The sale, although voidable by creditors, was valid as against the plaintiff.

This disposition of the case is challenged by counsel for plaintiff as not borne out by the facts shown by the record, and as erroneous in law. We are first told that there is no evidence in the case of a sale of the goods by the plaintiff to Rupenthal. On that subject the plaintiff testified:

"*Q.* Didn't you tell him (the constable) that you had sold it (the property); that you did not own it any more; it belonged to Mr. Rupenthal? *A.* That I gave him a bill of sale, yes, sir.

"*Q.* You told the constable that you had given a bill of sale to Rupenthal, and did not own the things at all, did you? *A.* *I don't know* that I told him I did not own it. I told him I had given a bill of sale to Rupenthal."

A bill of sale is a formal instrument for the transfer of goods and chattels (see Webster's dictionary), or an instrument evidencing the transfer of title to personalty (Anderson's law dictionary); and there is absolutely nothing in the case even tending to show that the plaintiff used, or intended to use, the term in any other sense than the one which it bears in common parlance as a law term, and in the sense in which it is used alike constantly by merchants and courts. The plaintiff's counsel himself testifies that, when told by the constable that his client had sold the goods, he told the constable, in his client's presence, "I know all about that *sale*, it don't amount to anything; you know, yourself, that the *sale* don't amount to anything." The only reasonable inference from this is that the *sale* was a sham, and not that it was some other transaction than a sale.

But the plaintiff's counsel maintains that the evidence elicited by him from his client, that the only

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consideration for the transfer to Rupenthal was twenty-five dollars, which his client owed Rupenthal, had a tendency to show that this instrument was a mere mortgage, and that it is always competent to show by parol that a conveyance absolute upon its face was a mere mortgage. That argument completely misconceives both facts and law. Since there was no evidence in this case that the property had been delivered to Rupenthal, or that the instrument was recorded, a mortgage would have been equally as fraudulent as an absolute sale.

On the other hand it is a novel and somewhat startling proposition that an instrument, absolute on its face, may be shown to be a mortgage by parol evidence as to innocent third parties. If such were the law, our registry laws would afford but little protection. The doctrine, that a conveyance absolute upon its face may be shown by parol evidence in a controversy *between the parties to the instrument* to have been executed as a mere security for debt, is a mere creation of equity (1 Jones on Mortgages [4 Ed.] sec. 282), and it has been formerly held in this state that such fact could not be shown even between the original parties in an action at law (*Hogel v. Lindell*, 10 Mo. 483), although *Wood v. Matthews*, 73 Mo. 481, seems to hold that it may be shown in an action at law, the court relying for its ruling on the authority of *Johnson v. Huston*, 17 Mo. 58, which was a suit for relief, and therefore, in the nature of a bill in equity. As this, however, was not a controversy between the parties to the instrument, the entire inquiry was foreign to the issues.

The plaintiff further contends that our decision is opposed to *Paddock v. Lance*, 94 Mo. 285. In that case the debtor had fraudulently conveyed some property, which was shown to have been all the property he had, save some household goods *of the value of about twenty dollars.* A creditor levied on the property

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fraudulently conveyed, bought it on execution, and brought suit to set aside the sham conveyances. The trial court set aside the sham conveyances, but also set aside the execution sale on the ground that the property was all the debtor had, and the sheriff had failed to notify him of the exemptions. The supreme court set aside the judgment of the trial court on the ground that the issues framed by the pleadings did not justify the setting aside of the execution sale, and added that, "as the respondents have made no appearance here, we will not attempt to say what relief they may have on proper pleadings, with proof to sustain them." The case at most contains an intimation, that, if the property fraudulently conveyed by the debtor was *all* the property he had, he *might possibly* claim his exemptions, after the sale is vacated for fraud. As the facts in this case present no such issue, we can only do as the supreme court did, and decline to express an opinion of what the remedy of the debtor is in a case which does present such facts.

We are aware that exemption laws are not for the benefit of the debtor alone, but mainly for that of his family, and should receive a liberal construction. We see no reason, however, for giving them a construction, by which provisions intended for a shield or protection should be turned into a sword of offense. If a debtor conveys property, however small, to another in fraud of his creditors, he can neither in law or equity set up the fraud against his grantee, and thereby avoid the conveyance, and that his family may suffer in consequence is of no avail. Yet he asks us to do that against an innocent creditor in this case, which he cannot do against a fraudulent grantee, because, against the fraudulent grantee, he could not even show that the conveyance absolute on its face was a mere mortgage. *Hassam v. Barrett*, 115 Mass. 256. The very least that the law should demand in such a case is to require of the debtor

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an affirmative showing that the property was all he had, and that, therefore, the creditor is not injured by the fraudulent conveyance, because the property was covered by the debtor's exemptions in any event.

It results from the foregoing that the judgment of reversal heretofore rendered must stand, and that the motion for rehearing must be overruled. All the judges concur.

FANNIE NORTON *et al.*, Respondents, v. ST. LOUIS AND HANNIBAL RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, April 29, 1890.

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1. **Railroads:** NEGLIGENCE. In an action against a railway company for personal injuries caused by the derailment of a car, a plaintiff makes out a *prima facie* case by proof that he was injured by the accident, without fault on his part, while traveling as a passenger on the car.

2. **Personal Injuries, Action for:** PHYSICAL EXAMINATION OF PLAINTIFF. The defendant in an action for personal injuries to the plaintiff has no absolute right to an order of court for the examination of the person of the plaintiff by medical experts; the making of such order rests in the discretion of the court, and a refusal to make it will not be disturbed unless an abuse of such discretion is shown.

3. **Practice, Trial:** UNWARRANTED NUMBER OF INSTRUCTIONS. When the number of instructions asked by a party is unwarrantably large, as where twenty-five are asked by a party in a cause in which the issues are simple and few, the trial court is justified in refusing all the instructions asked.

4. **Instructions not Supported by Evidence.** An instruction to the jury must be based on evidence and not on conjecture; otherwise it is erroneous.

5. **Practice, Trial:** REMARKS IN ARGUMENT OF COUNSEL. When counsel in argument to the jury by their remarks attempt to make a case, which they would not be allowed to establish by evidence, their conduct, if objected to at the time and allowed to pass unrebuked, is ground for a new trial at the instance of the opposite party. Remarks in case at bar *held* to come within this rule.

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6. ——— : PRESERVING EXCEPTIONS. When improper remarks in the argument of counsel to the jury are matter of exception, they should be preserved by the bill of exceptions, and not brought to the attention of the court only by affidavits filed in support of the motion for a new trial.

Appeal from the Pike Circuit Court.—HON. THOS. H. BACON, Judge.

REVERSED AND REMANDED.

Theo. G. Case, *J. P. Wood* and *Jas. H. Orr*, for the appellant.

(1) Appellant's application for examination of plaintiff by skilled and competent physician or surgeon was just and reasonable and made at the proper time. *Owen v. Railroad*, 95 Mo. 171; *Schroder v. Railroad*, 47 Ia. 379; *White v. Railroad*, 61 Wis. 536; *Sidekum v. Railroad*, 93 Mo. 403; *Shepherd v. Railroad*, 85 Mo. 629; *Hatfield v. Railroad*, 33 Minn. 130; *Railroad v. Thul*, 29 Kas. 466; 1 Thomp. Trials, sec. 859, p. 653. (2) The remarks of counsel for plaintiff in his closing argument before the jury were grossly improper and prejudicial. *Brown v. Railroad*, 66 Mo. 588; *Loyd v. Railroad*, 53 Mo. 509; *Mitchum v. State*, 11 Ga. 615, 633; 1 Thomp. Trials, sec. 963, p. 746, and cases cited, note 1; *Tucker v. Henniker*, 41 N. H. 317 and 324; *State v. Lee*, 66 Mo. 165. (3) The court erred in instructing the jury in plaintiff's third instruction, to take into consideration, in determining the amount of damages, such items as "necessary expenses for medical attention, for her nursing, care and support while disabled," when the only evidence adduced on the trial was that the defendant had paid for these items. Plaintiff failed to show that she had paid anything for these

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items. All the evidence went to prove that plaintiff's injuries were only temporary, yet the court instructed the jury to take into consideration the permanency of the alleged injuries.

John Megown and *G. W. Whitecotton*, for the respondent.

Respondent being a passenger on appellant's train, the mere fact that the train on which she was a passenger was derailed, and that respondent was thereby injured, raises the presumption of negligence on the part of appellant, which could only be removed by evidence on the part of appellant, and, unless so removed, entitled this respondent to a verdict. *Hipsley v. Railroad*, 88 Mo. 348; *Railroad v. Jones*, 9 N. E. Rep. 476. Under the facts of this case, and after the court had already ordered an examination of the person of the plaintiff by a disinterested physician, who was not a witness in the cause, it was not error for the trial court in the midst of the trial to refuse to order the plaintiff to submit to another examination at the hands of medical experts who were present as witnesses for the appellant. *Sidekum v. Railroad*, 93 Mo. 403; *Owen v. Railroad*, 95 Mo. 171; *Shepherd v. Railroad*, 85 Mo. 629.

ROMBAUER, P. J., delivered the opinion of the court.

The plaintiff, Fannie Norton, then Mrs. Dickerson, while traveling as a passenger in the caboose of the defendant's freight train, on June 7, 1887, received injuries to her person by the derailment and upsetting of the caboose. She thereupon instituted the present action, and on trial thereof recovered a verdict and judgment for six hundred and fifty dollars, to reverse which this appeal is prosecuted by the defendant.

Numerous errors are assigned by the defendant, but the following only are insisted upon in the brief filed

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by counsel, namely, that the court should have sustained the defendant's application for an examination of the plaintiff by skilled and competent physicians; that the remarks made by counsel for the plaintiff, Mrs. Norton, in his closing argument were grossly improper and prejudicial; and that the court erred in giving instructions on behalf of the plaintiff and refusing some asked by the defendant.

Before proceeding to the examination of the errors thus assigned, it is proper to refer briefly to the evidence, for the purpose of determining to what extent the rulings assigned as errors were likely to be prejudicial to the defendant in this case. Touching the cause of the accident there was no evidence adduced either by the plaintiff or defendant. The plaintiff's right of recovery rested exclusively on the fact that an accident occurred, and that she was injured without fault on her part, which, under the decisions, makes out a *prima facie* case for the passenger. *Hipsley v. Railroad*, 88 Mo. 353, and cases cited. The defendant gave evidence tending to show that its roadbed was in good condition; that the superstructure was sound and without apparent defect; that the caboose had been inspected immediately preceding the accident; and that the train was properly manned and was running at an ordinary rate of speed when the accident occurred. Touching the extent of the plaintiff's injuries the evidence was very conflicting. The plaintiff and her physician gave evidence tending to show that one of the spinal processes of the lumbar vertebræ was fractured, that such an injury caused nervous debility and may be permanent in its character, and that the plaintiff in consequence, by advice of her physician, discontinued her profession, which was that of a music teacher. There was no evidence that the plaintiff had either paid or incurred any *definite expenses* for nursing, care and support while disabled.

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The defendant, by several experts of standing, gave evidence tending to show that the plaintiff's injuries were not of a permanent character, that an examination of her person disclosed no injuries of the spine, that her symptoms showed an unimpaired health; that instead of losing flesh, which was the usual concomitant of nervous ailments, the plaintiff has, since the accident, been gaining in flesh and becoming more robust, and that her discontinuance of her professional labors was probably owing to the fact that she married within a few months after the accident.

It will be thus seen that the evidence adduced in the case presents a state of facts which would not authorize us to interfere with the verdict on the evidence alone, if it had gone either way. The plaintiff had a right to rely on her *prima facie* case, and the jury had a right to find, or not to find, that it was rebutted by the defendant's evidence. If the testimony of the plaintiff and her physician is true, there is nothing to show that the verdict is excessive; if, on the other hand, the testimony of the defendant's experts and some of its other witnesses is to be believed, there is ground for holding the verdict excessive.

We do not find in the record any exception properly saved in regard to the overruling of the defendant's motion for the examination of plaintiff's person by expert physicians. We may add, however, on that subject that, under the decisions in this state, the defendant has no absolute right to insist on such examination, and that there is nothing to show in this case that the discretion of the court on that subject was abused, even if an exception had been properly saved. *Shepard v. Railroad*, 85 Mo. 629; *Sidekum v. Railroad*, 93 Mo. 400; *Owens v. Railroad*, 95 Mo. 169.

The defendant asked twenty-five instructions, sixteen of which the court gave, and nine of which the court refused. We will not enter into the detailed

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examination of these instructions, but will say that the instructions given on behalf of the defendant placed substantially every element of the defense before the jury. We must add, however, that where the issues are simple and few, as they are in this case, the asking of such a number of instructions is wholly unwarranted, and their giving tends rather to confound than to enlighten the jury, and that we would be justified in holding, on the authority of *Crawshaw v. Sumner*, 56 Mo. 517, and *Desberger v. Harrington*, 28 Mo. App. 636, that the court would have committed no error, if it had refused all of the defendant's instructions on account of their number alone.

On plaintiff's behalf the court instructed the jury, in estimating plaintiff's damages, to allow her, among other items, "necessary expenses for medical attention, and medicines, for nursing, care and support, while disabled." There was no evidence that the plaintiff had either paid or incurred any definite amount for expenses on either of these heads, and as the verdict of the jury must be based on evidence, and not on conjecture, that part of the instruction was clearly erroneous.

The counsel for plaintiff in his closing argument to the jury, among others, made the following remarks: "Another thing, gentlemen of the jury, that I desire to call your attention to, and it is this: Under the law of this state, railroads of the class of this defendant are allowed to charge four cents per mile for all passengers. Now you all know that it is not worth anything like four cents per mile to do their passenger business, that is to say, it does not cost the defendant four cents per mile to do their passenger business. The law has allowed them to charge this excess in order that they may accumulate a fund to pay just such claims as this for injuries to their passengers." Which statement was at the time objected to by the defendant. Also the following remarks: "There is another thing in this case that does not look

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very well for the defendant, that will stand preeminently out among the other things, that do not look well in this case. They have undertaken to make capital of the fact that E. T. Smith, who is now dead and who was once an honored member of this bar, happens to visit this lady, at the instance of his wife, who, together with himself, was a personal friend of hers, four days after she was injured, and that has been lugged before you here as a reason why this thing came into court. They wanted to bring one of Mr. Smith's letters to this plaintiff before you. We all know that, when E. T. Smith wrote that letter he meant nothing dishonorable, but that all he said in that letter came from an honest conviction that she should have her rights." The latter of these remarks was made in regard to a letter written by Smith to the plaintiff, which the defendant tried to introduce in evidence, and which had been properly ruled out by the court.

These remarks were objected to at the time when made. The first the court permitted to pass unrebuked, and the second it positively sanctioned. Touching the impropriety of both these remarks there can be no question. They concerned facts which had no bearing whatever on the issues, and evidence touching the first would have been ruled out, if offered, and was actually ruled out in regard to the other. We held in *Gibson v. Zeibig*, 24 Mo. App. 65, that, where counsel have attempted to make a case in their argument to the jury, which the law would not allow them to make in their tenders of evidence, our courts have always ruled that such conduct, if objected to at the time and allowed to pass unrebuked, is ground for a new trial. The authorities in this and other states on that subject were fully examined in that case, and are collated in the main opinion, and in that on the motion for rehearing, and we reversed the judgment in that case on account of such remarks alone, and for no other reason.

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A simple comparison of the two cases will show that our reason for pursuing a similar course in this case would be much stronger, because the evidence is much more evenly balanced, and, under the state of the evidence, the remarks of counsel, and particularly the first, could have no other object or effect, than to inflame the prejudices of the jury, and that in a case where such incentive was equally unneeded and unwarranted.

At the same time we must add that, if this were the sole ground calling for a reversal of the judgment, its reversal would be of doubtful propriety, since the matter is not shown by the bill of exceptions, but only by affidavit of counsel for the defendant, filed in support of his motion for new trial.

The affidavit, it is true, is not contradicted, and its truth is substantially conceded by the statement and printed argument of counsel for the plaintiff. But the rule in this state is that improper remarks of counsel are matters of exception, and should be shown by the bill of exceptions, and not brought to the attention of the trial court by affidavits filed in support of motions only. *Roeder v. Studt*, 12 Mo. App. 566; *Skaggs v. Given*, 29 Mo. App. 612; *State v. Forsythe*, 89 Mo. 667.

As the judgment must be reversed on account of the error in the instruction above recited, we may suggest that the questions touching the conductor's sobriety on the occasion of the accident, which in no possible or conceivable way bore on the cause of the accident, be omitted on a retrial of the cause.

With the concurrence of Judge THOMPSON, the judgment is reversed and the cause remanded. Judge BIGGS, who has been of counsel in the case, although he did not participate in its trial, takes no part in this decision.

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THE STATE OF MISSOURI *ex rel.* HUGO S. JACOBI AND CHARLES D. BENNETT, Relators, Respondents, v. THEODORE HEEGE *et al.*, Appellants.

St. Louis Court of Appeals, April 29, 1890.

1. **Criminal Law**: ACTION OF COUNTY COURT IN AUDITING FEE BILLS: MANDAMUS. A county court acts ministerially in auditing the fee bills of justices of the peace and constables for costs in criminal cases, after the proper certification thereof by the judge of the circuit court and the prosecuting attorney; and *mandamus* is a proper remedy, if a county court refuses to perform its duty in this respect.

2. ———: COSTS OF JUSTICES OF THE PEACE. A justice of the peace is not deprived of his proper fees in criminal prosecutions before him for vagrancy under the statute of the state, by reason of the fact that he is also a recorder of a town, whose ordinances authorized similar prosecutions for vagrancy before him as such recorder.

3. ———: COSTS OF TOWN CONSTABLE. If the charter of a town authorizes a board of trustees to appoint a town constable or marshal and to prescribe his duties by ordinance, and an ordinance is accordingly adopted by such board, by which he is given all the powers and duties of a constable of any municipal township, such ordinance is valid, and a town constable or marshal so appointed is entitled to the same costs in criminal prosecutions in such town under the statutes of this state as would be allowed to an ordinary constable.

Appeal from the St. Louis County Circuit Court. HON. W. W. EDWARDS, Judge.

AFFIRMED.

C. A. DeFrance, *J. G. Hawken*, for the appellants.

Wm. S. Bodley, for the respondents.

BIGGS, J., delivered the opinion of the court.

This a proceeding by *mandamus* to compel the defendants, as judges of the county court of St. Louis

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county, to draw a warrant on the treasurer of the county to pay a bill of costs, alleged to be due the relators from the county in certain criminal cases mentioned in the petition. The circuit court, on a hearing, made the writ peremptory, and entered a final judgment or order in accordance with the prayer of the petition. The defendants have appealed from the judgment.

There is no dispute about the facts; hence only legal questions are presented for determination. The petition states, and the return to the alternative writ admits, that the relator Hugo S. Jacobi is, and was at the times hereinafter stated, a duly elected and qualified justice of the peace for Bonhomme township, in St. Louis county. The town of Kirkwood is located in this township, and the other relator, Charles D. Bennett, at the times hereinafter stated, held the position of constable or marshal of Kirkwood. By virtue of a special act of the legislature incorporating the town of Kirkwood, and the ordinances of the town council passed in compliance with the charter requirements, the marshal, within the corporate limits of the town, possessed all the powers of a constable. Several persons charged with being vagrants were arrested by Bennett under warrants issued by Jacobi as justice of the peace, and they were prosecuted and convicted under the general law of the state for vagrancy. For the costs incurred in these prosecutions Jacobi made out fee bills, in which were included his and Bennett's costs, and certified and returned them to the clerk of the circuit court of St. Louis county, as required by law. R. S. 1879, sec. 2117. The cost bills were examined, approved and certified by the judge of the circuit court, and the prosecuting attorney of the county. R. S. 1879, secs. 2108, 2110, 2111. The county court refused to order a warrant to pay the fee bills, and the relators have resorted to this action for the enforcement of their rights.

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The defendants' first position is that they, as county judges, in auditing fee bills for criminal costs, exercise judicial powers, and that their judgment in such matters can only be reviewed on appeal or writ of error. All of the authorities in this state are opposed to this idea, and favor the remedy by *mandamus*. When a bill of costs is properly certified by the judge of the circuit court and the prosecuting attorney, the duty of the county court in reference to its payment is purely ministerial, and, if the county court for any cause declines to act, the circuit court of the county has authority to compel the performance of the duty by *mandamus*. *Boone County v. Todd*, 3 Mo. 140; *St. Louis County v. Ruland*, 5 Mo. 268; *State ex rel. v. County Court*, 41 Mo. 254; *State ex rel. v. Smith*, 15 Mo. App. 412; *State ex rel. v. Hill*, 72 Mo. 512; *Sheridan v. Fleming*, 93 Mo. 321. The cases relied on by the defendants in support of the contrary view pertain to the allowance of coroner's fees. In auditing such fees the action of the court is judicial and not ministerial, because the statute expressly provides that in case of an inquest on a dead body the coroner's fees and costs must not be paid, unless it appears to the county court that the coroner, either before or during the view or inquest, had reasonable cause to believe that such body was that of a person who had come to his death by violence, etc. *State ex rel. v. County Court*, 83 Mo. 539; *State ex rel. v. Marshall*, 82 Mo. 484.

We will not notice the reasons assigned by the defendants for their refusal to pay Jacobi's fees, because we do not deem them of sufficient consequence. It is admitted that he was a justice of the peace of St. Louis county; that the cases, in which the costs were incurred, were prosecutions under the state law for vagrancy; and that the costs taxed by him had been examined, approved and certified by the officers, whose duty it was to pass on such claims. Under such admissions there can be no question as to Jacobi's right to

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the payment of his costs. The fact that he was the recorder of the town of Kirkwood, and that there was an ordinance of the town authorizing the prosecution and punishment of vagrants, amount to nothing. The jurisdictions were concurrent and in no way conflicting.

The determination of the question touching Bennett's charges is attended with more difficulty, but we have concluded that the taxation of costs in his favor as constable was authorized by law.

The town of Kirkwood was incorporated by a special act of the legislature, and, in the charter thus granted, the board of trustees was authorized and required to appoint a town constable, or marshal, and it was made the duty of the board to prescribe his duties by ordinance. In pursuance of the power thus conferred, the board of trustees passed an ordinance defining his duties and powers. The first section of the ordinance reads as follows: "The marshal of the town of Kirkwood shall, within the corporate limits of the town, possess all the powers and perform all the duties, which are now or shall hereafter be given by the general laws of this state to any constable of any municipal township."

The legislature has the authority by charter to delegate to municipal corporations the power to make by-laws and pass ordinances, and the ordinances passed in pursuance of the authority, thus delegated, have, within the territorial limits of the corporation, the force and effect of laws passed by the legislature itself. The only difference is that one class of laws emanates directly from the law-making power of the state, and the other is presented in a delegated form. A city council has been denominated, "a miniature general assembly." *City of St. Louis v. Foster*, 52 Mo. 513; *Spitler v. Young*, 63 Mo. 42; 1 Dillon's Municipal Corporations, sec. 308. Under this view of the law, it necessarily follows that Bennett, within the corporate

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limits of the town, possessed all the powers of an ordinary constable, and was clothed with authority to act as such.

It is conceded that the arrest of the vagrants was made within the town limits; that the process was directed to Bennett as constable, and that his charges were such, as are allowed by law to constables for like services. In our opinion he is entitled to his fees, and we will, therefore, affirm the judgment. It is so ordered. All the judges concur.

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MARVIN DIMMITT, Respondent, v. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, April 29, 1890.

1. **Practice, Appellate:** REVIEWING FINDING OF DAMAGES. In an action for personal injuries, the policy of the law is to leave the determination of the damages, under proper instructions, to the judgment of the individual jurors, and not to interfere, unless it is manifest that the verdict was the result of passion or prejudice. And *held*, in the case at bar, that there was no such warrant for interference, though the damages allowed seemed large and rather out of proportion to the injuries received, the verdict being two thousand dollars, and the injuries consisting of a bad sprain of the ankle and a rupture or great sprain of the ligaments in the ankle joint.

2. **Railroads:** NEGLIGENCE: ACTION OF INJURED PERSON INDUCED BY DANGER. If a passenger on a railroad car, which has been derailed by the negligence of the railroad company and is in danger of overturning, jumps from the car, while in motion, in order to escape peril, and receives injuries in so doing, it is no defense to his action for such injuries to say that he was unnecessarily alarmed, and that he would have escaped injury, if he had remained on the car.

3. ——— : ——— : BURDEN OF PROOF. In a suit for such injuries the plaintiff establishes a *prima facie* case by proof that he was a passenger on the railroad car and that he received the injuries complained of in consequence of the derailment of the car; the

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burden of proof is then upon the railroad company to show that there were no acts of negligence, either of omission or commission, by any of its servants contributing to the accident, and that the derailment of the car was occasioned by inevitable casualty which the utmost skill and diligence could not have prevented, or by the act of a stranger which it, the railroad company, could not have foreseen or anticipated.

4. ——— : ——— : ACTS OF STRANGERS. If a duty or service obligatory upon a servant of a railway company be negligently performed by a stranger, the railway company is responsible for damages occasioned to passengers on one of its trains through such negligence, if the stranger performed such duty or service at the request or with the assent of such servant, or in the presence of, and without objection on the part of, such servant.

5. **Instructions**: ASSUMPTION OF FACTS: NON-PREJUDICIAL ERROR. *Held*, that the assumption of matters of fact in instructions in this case was no ground for the reversal of the judgment, because these matters were affirmatively established by the evidence of the appellant.

Appeal from the Shelby Circuit Court.—HON. THOS. H. BACON, Judge.

AFFIRMED.

Strong & Mosman, for the appellant.

(1) The defendant's demurrer to the case made by the evidence for the plaintiff should have been sustained. (2) Unless Kincaid's "act can be legally attributable to the company, it is clear the company was not the cause of the injury. The maxim, *qui facit per alium facit per se*, can only apply where there is an authority, either general or special. It is natural justice that one man should not be held liable for the act of another, without his participation, his privity or his authority." *Flower v. Railroad*, 69 Pa. St. 210, cited approvingly in *Snyder v. Railroad*, 60 Mo. 418; *McGuire v. Grant*, 25 N. J. L. 371; *Yates v. Squires*, 19 Ia. 26. (3) Even had the evidence gone so far as to show that Kincaid was directed by the brakeman to get

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off and turn the switch, the defendant would not be liable. Such direction would not have been within the scope of the employment of the brakeman. The evidence shows that he had no such power or authority. *Hudson v. Railroad*, 16 Kas. 474; *Sherman v. Railroad*, 72 Mo. 65–66; *Stringer v. Railroad*, 96 Mo. 302; *Snyder v. Railroad*, 60 Mo. 413; *Jewett v. Railroad*, 55 N. H. 84; *Whitehead v. Railroad*, 22 Mo. App. 621. (4) The defendant was guilty of contributory negligence. *Reary v. Railroad*, 40 La. 32; *Railroad v. Felton*, 125 Ill. 458; *Railroad v. Wallen*, 65 Tex. 568. (5) The damages were excessive.

R. P. Giles, *W. O. L. Jewett*, for the respondent.

The damages were not excessive. Appellant seeks to escape by saying that the negligence in question was not that of its servant, but of a stranger. Kincaid was no stranger. He had been doing the company's work at Shelbina. He was returning from Brookfield, where he had been by his own confession on business for the appellant. *Prima facie* a person found doing a service for another is the other's employe. *Perry v. Ford*, 17 Mo. App. 212–220; 2 Thompson on Neg. 893, 899. The respondent, having shown that he was injured in consequence of the negligent throwing of the appellant's switch while a passenger on appellant's train, thereby made a *prima facie* case in its behalf. Hence it would have been error for the court to sustain the demurrer to the evidence. *Coudy v. Railroad*, 85 Mo. 84; *Hipsley v. Railroad*, 88 Mo. 348; *Lemon v. Chanslor*, 68 Mo. 341; Shear. & Redf. on Neg., sec. 280; *Edgerton v. Railroad*, 39 N. Y. 227; *Young v. Kinney*, 28 Ga. 111; *Fairchild v. Stage Co.*, 13 Cal. 599.

Biggs, J., delivered the opinion of the court.

On the seventh day of September, A. D. 1888, the plaintiff was a passenger on one of defendant's trains

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from Clarence to Shelbina. At or near the railroad station at Shelbina, the car or caboose in which the plaintiff was riding was derailed, and the plaintiff, in jumping from the car after it had left the track, sprained his ankle; he has brought this action to recover damages for the injury thus received.

The plaintiff in his petition charged that the accident to the train was brought about through the negligence of the defendant's servants, having it in charge, and the negligence, thus imputed to the defendant, was predicated on the following facts, as stated in the petition, to-wit: "Plaintiff states that the defendant was guilty of negligence and carelessness in this, that while plaintiff was such passenger in said caboose car on said train, and before it reached the station at said city of Shelbina, and while it was approaching said station, and while the said train and caboose car were in motion and being run onto a sidetrack of defendant's, and after the locomotive, freight cars and front trucks of the caboose car had passed onto the sidetrack, the rear trucks of the caboose car being still on the main track, the defendant, its servants and employes carelessly and negligently caused the switch on defendant's railroad to be thrown and closed, thereby causing the rear trucks of the caboose car to be violently thrown off the track, and on to the ends of the ties and between the rails of said railroad, causing said caboose car to bound from tie to tie and from side to side; and the defendant, its servants and employes then and there carelessly and negligently failed to stop said train, and then and there so carelessly and negligently ran and managed said train, and so carelessly and negligently continued to move the same at a great rate of speed," etc. The petition concluded with the statement that the injuries received by plaintiff in escaping from the car were permanent, and that he had been damaged in the sum of five thousand dollars.

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The defendant's answer, after tendering the general issue, interposed the defense of contributory negligence.

The jury returned a verdict in plaintiff's favor for two thousand dollars, and a final judgment was entered thereon. The defendant has appealed from this judgment, and claims that it is erroneous and cannot be sustained for the following reasons: *First.* The damages are excessive. *Second.* The undisputed facts show that the plaintiff's own negligence contributed directly to the injuries received. *Third.* The court erred in admitting illegal evidence and in giving improper, and refusing proper, instructions. *Fourth.* The evidence failed to show that the accident was caused by the negligence of the defendant's servants.

I. The damages allowed by the jury seem to us to be large and rather out of proportion to the injuries received. The difficulty, however, in dealing with such question is, that there is no rule of law by which appellate courts can be guided in determining what sum ought to be awarded in personal injury cases. The policy of the law is to leave the determination of such matters, under proper instructions, to the judgment of the individual jurors, and in no case can the court interfere, unless it is manifest that the verdict, on account of the amount of damages awarded, was the result of passion or prejudice. In the present case four physicians testified concerning the plaintiff's injuries. They all agreed that the ankle was badly sprained, and that the ligaments in the angle joint had either been ruptured or greatly sprained. The plaintiff's evidence in respect of the permanency of the injury was as follows: Doctor Priest testified: "It would get better, but at the same time it would not be a sound limb. I do not think it would ever be good." Dr. Wainright testified: "Well, the chances are against a permanent recovery, for this reason, that the joint at the place would not be put at rest long enough until a complete recovery could take place, and, if it was put at rest long enough, it would

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be a stiff joint. For this reason injuries of this kind never fully recover." In addition to this it was disclosed by the evidence that the plaintiff was, at the date of the trial, compelled to support his ankle with a metallic brace, and when the brace was removed his ankle would give way. The defendant introduced no countervailing proof. In view of the foregoing evidence we would not be warranted in holding that the verdict was the result of passion or prejudice, and we will, therefore, rule this assignment against the defendant.

II. The question of contributory negligence was submitted to the jury under proper instructions, and the issue was found against the defendant. We are of opinion that the finding is amply supported by the evidence. It was shown that the plaintiff was sitting in the car when the derailment occurred; that the car, after it left the rails, was not detached from the train, but went bouncing over the ties at the rate of eight or ten miles an hour; that the indications were that it would be completely overturned, and that, while the car was thus in motion, the defendant ran to the rear door of the caboose and jumped off. If the plaintiff was placed in this perilous position through the negligence of the defendant's servants, it would be a strange doctrine indeed, if defendant could escape liability by showing that the plaintiff, in attempting to escape from the car, failed to exercise ordinary prudence. The plaintiff had a right to act on appearances, and it is no answer to his suit to say that he was unnecessarily alarmed, and if he had remained on the car he would not have been hurt. *Siegrist v. Arnot*, 86 Mo. 200; *Eldridge v. Railroad*, 1 Sand. Sup. 89; *Railroad v. Aspell*, 23 Pa. St. 147; *Buel v. Railroad*, 31 N. Y. 314; Hutchinson, Carriers, sec. 534. We will have to rule this assignment likewise against the defendant.

III. The other assignments may be considered together. It is urged by the defendant that the evidence failed to show that the accident was brought

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about through the negligence of the defendant's servants, and that its instruction to find for the defendant ought to have been given. It is conceded that the plaintiff was a passenger on the defendant's train, and the evidence leaves the cause of the accident in no doubt. The car was derailed in the following manner: When the train arrived at Shelbina, the switch was turned so as to run the train on a sidetrack. The caboose or passenger car was attached to the rear end of the train, and after the front trucks of the caboose had left the main track, but before the rear trucks had reached the sidetrack, one Walter Kincaid negligently threw the switch back, thereby throwing the car from the rails. The evidence introduced by the plaintiff had some tendency to show that Kincaid was in the defendant's service, and was engaged in the capacity of a brakeman on the train.

When the plaintiff showed that he was a passenger on the defendant's train, and that he received the injuries in consequence of the derailment of the car in which he was riding, a *prima facie* case for him was made out, and the burden of proof was then with the defendant to show to the satisfaction of the jury that there were no acts of negligence, either of omission or commission, by any of its servants, contributing to the accident, and that the derailment of the car was occasioned by inevitable casualty, which the utmost skill and diligence could not have prevented, or by the act of a stranger, which the defendant could not have foreseen or anticipated. *Higgins v. Railroad*, 36 Mo. 418; *Lemon v. Chanslor*, 68 Mo. 340; *Coudy v. Railroad*, 85 Mo. 79; *Hipsley v. Railroad*, 88 Mo. 348.

Whether the defendant's evidence was sufficient to rebut plaintiff's *prima facie* case was for the jury in the first instance, and not the court. If the court had directed a verdict for the defendant, it would have been an absolute invasion of the province of the jury. *Hipsley v. Railroad*, *supra*. The better practice is not to

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direct a verdict for the parties sustaining the burden of proof in any contested case, and, if the jurors abuse their right to pass on the credibility of witnesses and the weight of their evidence, it is the duty of the trial judge to correct the wrong by granting a new trial. But this discussion is not of much importance, because, under the view which we have taken of defendant's liability under the undisputed facts, the finding of the jury was for the right party. We, therefore, conclude that the trial court did right in refusing to direct the jury that the plaintiff could not recover.

It is next urged that the verdict and judgment are contrary to the evidence and instructions. The court instructed in substance that the plaintiff could not recover, unless the car was derailed by reason of negligence on the part of defendant's servants or employes. This view of the case was presented to the jury by all the instructions. The argument is now made that there was no substantial evidence tending to show that Kincaid, who negligently threw back the switch, was a servant of the defendant. The evidence satisfies us that Kincaid was not in the defendant's service, and that his acts and conduct, concerning the operation of the train on which the plaintiff was a passenger, were voluntary. But it does not necessarily follow from this that the defendant ought not to be held liable for the consequences of the accident. The rule is that one man cannot be held liable for the tortious acts of another, without his participation, privity or authority. *Snyder v. Railroad*, 60 Mo. 413. Therefore, if the negligent act of Kincaid cannot be legally attributed to the defendant, the judgment in this case is wrong and must be reversed. The determination of the question necessitates a reference to the testimony in the case. It was shown by the plaintiff's evidence that Kincaid was on the train from Clarence to Shelbina; that he got off at stations and helped the other railroad men to load and unload freight; that he set brakes on the cars,

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and that the train men made no objection. That portion of Kincaid's testimony bearing directly on the cause of the accident was as follows:

"*Q.* Who learned you to throw switches? *A.* I hadn't been learned at that time.

"*Q.* How did you happen to do it that time? *A.* I just walked on off the platform, and when I got out I got off and threw the switch.

"*Q.* Did the brakeman allow you to do that? Did he made any objection? *A.* As I walked out of the caboose, the brakeman was standing on the platform of the caboose, and when I got near the switch stand he walked down by me, and I says to him that I would throw the switch for him.

"*Q.* Did you tell him before you passed him or after you passed him? *A.* I told him as I passed him.

"*Q.* Did he try to stop you? *A.* He didn't have time.

"*Q.* Could he not have taken hold of you? *A.* He might have taken hold of me.

"*Q.* He didn't force you not to? He was right by you, and he did not force you not to? *A.* No, sir."

Elmer C. Flopper was the brakeman whose duty it was to throw the switch. He testified as follows:

"When he (Kincaid) stepped off the car I was standing on the platform on the front end of the way car.

"*Q.* Did not Kincaid then tell you that he was going to throw the switch? *A.* Yes.

"*Q.* Did you make any objection? *A.* No."

The principles of law governing the liability of a carrier to its passengers has been laid down by the supreme court as follows: "It has been accordingly held that passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight can go; that is for the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the

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slightest, neglect. * * * For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them, by satisfactory proofs, to repel every imputation thereof." *Lemon v. Chanslor*, 68 Mo. 340. The legal obligation thus imposed on the carrier to look to the safety of his passengers necessarily requires of him the utmost care in the selection of safe and suitable vehicles, and the employment of competent and skilled servants to conduct the business. The law not only contemplates the employment of competent servants, but it exacts the performance, *by the servants themselves*, of all duties imposed. If such a duty is performed by a third person, either at the request of the servant or with his mere assent, if it is done in his presence and without objection by him, the act must be regarded as that of the servant himself, and if it be negligently done, and an injury should result to a passenger on account of it, the carrier ought to be held liable. It is the duty of the servant in such employment to *prevent officious intermeddling* with his duties, when known to him. The fact that he did not request the intruder to perform the service ought not to excuse the master. To rule differently would in effect abrogate the rule governing the carrier's liability. Therefore, from the defendant's own evidence, we must conclude that the act of Kincaid in throwing the switch was the act of Flopper, the brakeman, and as it was negligently done, and caused the accident, the defendant must be held responsible for the resulting injuries. *Eaton v. Railroad*, 11 Allen, 500; Hutchinson, Carriers, secs. 513, 527 and 535.

It was suggested in the argument that the view taken by us was not directly presented to the jury by the instructions; that, whether Flopper knew that Kincaid intended to throw the switch or whether he could have prevented the action of Kincaid in intermeddling with his duties as brakeman, were questions of fact, and ought to have been passed upon by the jury. All of

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this may be conceded, and yet it would not be proper for us to reverse the judgment and remand the cause, because the defendant's own evidence establishes the affirmative of these issues.

The foregoing discussion disposes of all other assignments adversely to the defendant and necessarily leads to an affirmance of the judgment. The judgment of the circuit court will therefore be affirmed. Judge THOMPSON concurs in this opinion. Judge ROMBAUER concurs in the result.

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CHARLES MARTIN, Administrator of S. R. MARTIN, Deceased, Appellant, v. JAMES W. FOX *et al.*, Defendants; JAMES A. FARMER, Interpleader, Respondent.

St. Louis Court of Appeals, April 29, 1890.

1. **Practice, Appellate:** ASSIGNMENT OF ERROR. An assignment of error in general terms, which is applicable to a number of similar rulings of the trial court, and does not point out to which of these rulings it refers, is not properly made.

2. **Practice, Trial:** PLEADING: CLAIM FOR PROPERTY LEVIED UPON. When property levied upon under an execution is claimed by a third person, and an indemnifying bond is given by the execution plaintiff, which is returned to court, as provided by Revised Statutes, 1879, section 2367, and proceedings are then had in the circuit court, as provided by said section, the law contemplates that there shall be written pleadings, as in civil actions.

3. ——— : ——— : ———. An answer filed by the execution plaintiff, merely denying that the claimant "is in good faith the lawful owner of the whole property," so levied upon and claimed, is insufficient to raise the issue that a sale of the execution debtor to the claimant, under which the claimant derived title to the property, was fraudulent as to the creditors of the debtor.

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4. ——— : ——— : ———. If the execution plaintiff in such case seeks to hold the property on the ground that his judgment is for the purchase money thereof, and that the claimant is not a *bona fide* purchaser without notice, he should plead such claim.

5. **Fraudulent Conveyances:** EVIDENCE OF THE VENDOR'S INSOLVENCY. In the trial of an issue, whether a sale of property in dispute was fraudulent as to the creditors of the vendor, evidence of the insolvency of the vendor more than a year after the sale is irrelevant.

6. ——— : PRESUMPTIONS : BURDEN OF PROOF. Evidence of the possession of the property by a claimant of it is *prima facie* evidence of his ownership of it; and in the trial of an issue, whether the sale of that property to such claimant was fraudulent as against the creditors of the vendor, who attack the *bona fides* of the transaction, such creditors have the burden of showing the sale to have been fraudulent.

7. ——— : ———. The fact that the vendor of property is insolvent, and that the vendee is closely related to him, does not raise any legal presumption of fraud. These are mere circumstances to be considered by the trier of the facts in the determination of the good faith of the transaction as to creditors of the vendor.

Appeal from the St. Charles Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED.

Theo. Bruere, *C. J. Walker* and *Charles Martin*, for the appellant.

O. J. Mudd, for the respondent.

THOMPSON, J., delivered the opinion of the court.

In this case the plaintiff took out an execution upon a judgment in his favor, as administrator of the estate of S. R. Martin, deceased, against James W. Fox and Henry Fox. The sheriff levied the same on two mules, as the property of the defendant James W. Fox. They were at the time of the levy in the hands of James A. Farmer. Farmer served the sheriff with a notice

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and affidavit, claiming the mules as his property, in compliance with section 2366 of the Revised Statutes of 1879. The plaintiff thereupon gave an indemnifying bond to the sheriff, as provided in the statute, who returned the execution, together with the claim of Farmer and the indemnifying bond, into court. Thereupon the plaintiff filed in court, under the provisions of section 2367 of the Revised Statutes of 1879, the following answer to the claim made by Farmer: "Now comes Charles Martin, administrator of the estate of S. R. Martin, deceased, and denies that James A. Farmer is in good faith the lawful owner of the whole property seized under the above execution, to-wit, of the two mules, one large black horse mule and one dark-bay horse mule; and denies every other allegation contained in the claim of said James A. Farmer, served on the sheriff in the above cause."

It is observed that this answer does not in terms set up that the mules in controversy had been transferred by the defendant James W. Fox to Farmer for the purpose of hindering, delaying or defrauding the creditors of Fox. In *Claflin v. Sommers*, 39 Mo. App. 419, this court held that an attaching creditor cannot, under a general denial of an interplea in an attachment suit, prove that the goods were transferred to the interpleader in fraud of the creditors of the defendant in the attachment. Whatever doubt may have been cast on this conclusion by the decision of the supreme court in *Young v. Glasscock*, 79 Mo. 574, there is no doubt that it is in accordance with the prevailing American doctrine that fraud is an affirmative defense which must be specially pleaded, in order to be proved. *Jenkins v. Long*, 19 Ind. 28; *Farmer v. Calvert*, 44 Ind. 212; *Keller v. Johnson*, 11 Ind. 337; s. c., 71 Am. Dec. 355; *Clapp v. Cedar County*, 5 Ia. 15; s. c., 68 Am. Dec. 678; *Gushee v. Leavitt*, 5 Cal. 160; s. c., 63 Am. Dec. 116; *Hynson v. Dunn*, 5 Ark. 395; s. c., 41 Am. Dec.

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100; *Giles v. Williams*, 3 Ala. 316; s. c., 37 Am. Dec. 692; *Davis v. Hooper*, 4 Stew. & Port. (Ala.) 231; s. c., 24 Am. Dec. 751. Here, the allegation of the answer falls entirely short of a charge that the property in controversy had been conveyed to Farmer by James W. Fox for the purpose of hindering, delaying or defrauding the creditors of the latter. Even the denial "that James A. Farmer is the lawful owner in good faith of the *whole* of the property seized under the above execution" is consistent with the conclusion that he is in good faith the lawful owner of a *part* of it. The parties, nevertheless, seem to have tried the case on the theory that the issue of fraud, above stated, was raised by the form of the answer, and the court gave, at the request of both parties, instructions which were tendered on that theory. The jury returned a verdict for the claimant, judgment was entered accordingly, and the plaintiff appeals to this court.

I. The first assignment of error is that the court should not have rejected certain questions which were put to witnesses, tending to show James W. Fox's financial condition *subsequent* to the sale of the mules by Fox to Farmer. We observe that this error is not aptly assigned, and on this point of practice we call attention to what was said in *Honeycutt v. Railroad*, *post*, p. 674, and the cases cited. There were as many as *six* exceptions saved to rulings of this kind in divers places in the record, and the appellant does not state, by reference to the page of the record, or otherwise, to which of them he specially refers.

We have, however, looked at them all, and we see no error in the court's rulings. In the first place, as already pointed out, there was no issue raised by the pleadings as to any fraudulent sale of the property in controversy from James W. Fox to Farmer, and accordingly there was no issue to which the question of Fox's solvency at the time of such sale was at all relevant.

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This of itself is sufficient to justify the action of the trial court.

But beyond this, it is proper to say, in view of the fact that the parties seem to have tried the controversy as though such an issue was in the case, that the question of the solvency of James W. Fox at the time when he sold the mules to Farmer was very fully and elaborately gone into. Indeed, a large portion of the record is taken up with such evidence, and nothing was excluded which related to the time of the transaction. Some of that which was excluded did, however, relate to a period of time more than a year subsequent. The financial status of parties at dates anterior to a transaction is admissible, on the theory of the continuance of things shown to exist, and can in its very nature have no backward operation.

II. Complaint is made of the instructions. They seem to have been nearly all erroneous, but, considering the state of the issues, the errors were all against the claimant.

First. The following, given at the request of the claimant, is complained of: "The court declares the law to be that, before the plaintiff Martin can recover in this case, he must prove, by a preponderance of the testimony, that the sale of the mules by Fox to Farmer was made to defraud, hinder or delay the creditors of Fox, and that Farmer participated in this design of Fox, to so hinder, delay or defraud his creditors; and the jury are further instructed that, if all the circumstances in evidence in the case can be as well consistent with the good faith as with the dishonesty of Farmer's intentions, you must find for the interpleader Farmer."

At the request of the plaintiff, the court gave the following: "Before the interpleader Farmer can recover in this cause, he must satisfy the jury that he purchased the mules in controversy in good faith and for a valuable consideration paid by him at the time of such purchase.'

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It is true, as the appellant argues, that these instructions are contradictory; but, as that given for the claimant was right and that given for the plaintiff was wrong, only the claimant could have been harmed by the contradiction. The claimant was in the possession of the mules, claiming title to them, at the time of the levy. These facts were *prima facie* evidence of his title, and it devolved upon the plaintiff to show that they did not belong to him, but that they belonged to James W. Fox, if such was the fact. Nevertheless, the claimant did assume the burden of making good his title at the outset, and he sustained the burden by evidence which was clear. He showed a purchase from James W. Fox for a full consideration; and there was nothing to impeach his title, except such suspicions or surmises as could arise from the fact that Fox was his brother-in-law, and was being sued by his creditors. There was nothing in the circumstances attending the levy, which, as the appellant argues, operated in law to change the burden of proof and put it upon the claimant. He held a chattel mortgage upon the mules and other personal property. It had been filed for record in the recorder's office. The mules were in the possession of James W. Fox, the mortgagor. A deputy sheriff visited Fox with an execution, and notified him of his intention to levy upon the mules; but, upon Fox's promise to bring the mules in the morning to St. Charles, and there surrender them to the sheriff, if he could not fix the matter up with the plaintiff's attorney, the deputy allowed him to retain them, and did not make the levy. Fox did not keep this promise, but drove the mules to St. Charles in the night, and the next day delivered them to Farmer, who thereupon satisfied of record the chattel mortgage, releasing the other property included in it to Fox's creditors. Afterwards, on the same day, the sheriff levied the execution of the plaintiff on the mules. Fox

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acted unfaithfully with the sheriff, but he appears to have done it in an effort to keep faith with his mortgagee. There is no evidence that the debt, for which Farmer took the mules and satisfied the chattel mortgage, was more than the value of the mules, but, as the debt was at that time two hundred and fifty-nine dollars, the contrary is a fair inference. It would be idle to discuss the question that, to overthrow the title of the parties in possession of personal property, on the theory of his having acquired it through fraud, the burden of proof of the fraud is on the party seeking to overthrow the title. It is a fundamental principle that fraud is not presumed, but that honesty and good faith are presumed, and that the burden of proving fraud is on the party alleging it. But here we must also renew the observation that it is not even alleged in the pleadings.

Second. The plaintiff requested the following instruction:

"6. If the jury believe that the mules in controversy were sold to said Fox by S. R. Martin, and the judgment upon which they were taken in execution by the sheriff was rendered for the purchase price of said mules, then the interpleader Farmer cannot recover in this suit, unless he is an innocent purchaser for value, without notice of the existence of such prior claim for the purchase money; and, if said Farmer paid for said mules exclusively by claims held by him against Henry and James W. Fox, and by giving of his own note to James W. Fox, then he is not an innocent purchaser for value as against such execution creditor of said James W. and Henry Fox."

The court refused to give this instruction as requested, but gave it in the following form:

"7. If the jury believe that the mules in controversy were sold to said Fox by S. R. Martin, and the judgment upon which they were taken in execution by

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the sheriff was rendered for the purchase price of said mules, then the interpleader Farmer cannot recover in this suit, unless he is an innocent purchaser for value, without notice of the existence of such prior claim for the purchase money; and, if said Farmer paid for said mules exclusively by claims held by him against Henry and James W. Fox, he is not an innocent purchaser for value."

We do not think it necessary to inquire whether, in a proper state of the pleadings, this ruling was correct or not. There was no issue in the pleadings as to whether the judgment, under which the execution in favor of the plaintiff was issued, was for the purchase money of these mules. The statute under which this proceeding took place contemplates that there shall be written pleadings, as in civil actions. "The execution creditor shall answer or demur to the claim returned by the officer, on or before the second day of the term, and the claimant may reply to the answer within such time as may be directed by the court; and all proceedings in relation to such claim shall be governed, as far as practicable, by the law relating to pleadings and practice in civil actions." R. S. 1879, sec. 2367. The court ought not to give instructions on issues not made by the pleadings. This is a fundamental rule in our practice.

But here, if there had been such an issue raised by the pleadings, the evidence would not have warranted any instruction on the subject. The evidence, at most, went no further than to show that *one* of the mules was one for the purchase price of which the plaintiff had recovered the judgment. But this mule together with the other, which was the subject of the levy, had been sold by James W. Fox to Farmer in September, for a consideration, the greater portion of which was *not* the cancellation of an indebtedness owing by Fox to Farmer. In the following February they had been resold by

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Farmer to Fox, together with other chattels, Fox giving to Farmer the chattel mortgage already spoken of, for the purchase money. Besides, there was no evidence whatever, direct or circumstantial, tending to show that Farmer knew that the mules had been purchased of the plaintiff's intestate, and not paid for; and his own evidence was distinctly to the effect that he had no knowledge that such was the fact. There was, therefore, no appropriate case made by the evidence, even if there had been such an issue in the pleadings, for any instruction on this question; and the ruling of the court, above stated, was, therefore, not harmful to the plaintiff.

Third. The plaintiff requested, and the court refused, the following instruction:

"8. If the jury believe that James W. Fox was insolvent, or largely indebted at the time of the alleged sale of said mules by said Fox to his brother-in-law, James Farmer, the inference which the law draws from such sale between persons so related is that the same was made to defeat the collection of debts against said Fox; and, to overcome this inference or presumption, it devolves upon said Farmer to satisfy the jury, by a preponderance of the evidence, that he bought said mules of said Fox in good faith, and for a valuable consideration, paid or parted with at the time of such alleged sale."

The court did not err in this ruling. It would have been gross error to give this instruction. The *law* does not draw any inference of fraud from the fact that a person makes a sale of his property, when he is insolvent or largely indebted, although the sale is made to a person closely related to the vendor. Such evidence does not raise any *legal* presumption of fraud, which the vendee is required to overcome. Our law has no rule on this subject, except that the indebtedness or insolvency of the vendor and his relationship to the

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vendee are circumstances to be considered by the jury in determining the good faith of the transaction. Wait on Fraudulent Conveyances, sec. 242; *State ex rel. v. True*, 20 Mo. App. 176.

Fourth. The court was asked by the plaintiff to give the following instruction: "From the relationship existing between the said Fox and said Farmer, taken in connection with other circumstances, the jury might infer that said Farmer had notice that said Fox purchased said mules of S. R. Martin and had not paid for the same, provided that the jury find that said mules were purchased of S. R. Martin and had not been paid for." The court refused to give this, but gave the following of its own motion: "The relationship of the parties is a fact which the jury may take into consideration in connection with other facts and circumstances in evidence in passing upon the issues presented by the pleadings."

This, for the reason stated in the preceding paragraph, was quite as far as the court could go. To have given the instruction, which was requested, would have been the grossest error. The idea that there is a rule of law which would impute knowledge on the part of Farmer, from the mere fact of his being the brother-in-law of James W. Fox, that Fox had bought these particular mules from the plaintiff's intestate without paying for them, is the wildest dream,—especially in view of Farmer's own testimony that he did not know the fact.

The judgment will be affirmed. All the judges concur.

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ALICE A. HONEYCUTT AND JOHN W. HONEYCUTT, Respondents, v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, April 29, 1890.

1. **Laws:** CONSTRUCTION: TIME OF TAKING EFFECT. Under section 16 of the act of 1889, "declaratory of the Revised Statutes," the law of 1889, changing the time for the holding of the circuit court of Wayne county, took effect as to all its provisions, and not merely as to that providing for such change, ninety days after the adjournment of the legislature.

2. **Practice, Appellate:** ASSIGNMENT OF ERRORS. Errors may be assigned by brief, but it is the duty of the appellant to specifically point out the errors complained of, and a general assignment of error, applicable as well to one as to another of a number of different rulings of the trial court, is insufficient. *Held*, accordingly, that an assignment, that "the court erred in admitting illegal, improper and irrelevant evidence offered by the plaintiffs against the defendant's objections," was insufficient, the record disclosing a number of exceptions to rulings of this kind.

3. ——: ——. If an assignment of errors be made by brief, it is improper to throw together a number of alleged errors of different kinds in a single paragraph, and to cite authorities *en masse* under it. Each alleged error should be separately assigned, and the authorities relied upon in support of it should be cited separately in connection with it.

4. ——: WEIGHING THE EVIDENCE. In an action at law an appellate court has nothing to do with the mere weight and preponderance of the evidence, and an assignment of error, that "the verdict was manifestly against the weight and preponderance of the evidence," is not a specification of error which is assignable in such an action in this court.

5. ——: REVIEWING FINDING OF DAMAGES. Although an award by the jury in an action for personal injuries may seem large, it cannot be interfered with by an appellate court, unless it is so large as plainly to show passion, prejudice or a disregard of the evidence by the jury. And *held* that interference was not warranted in this case, the verdict therein being for twenty-two hundred and fifty dollars for injuries to the right hand of the plaintiff.

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6. **Practice, Trial:** PRESERVATION OF EXCEPTIONS BY MOTION FOR NEW TRIAL. Exceptions taken to the refusal of the trial court to check improper remarks of counsel to the jury, upon due objections thereto, are lost, if the objection thereto be not renewed by motion for new trial.

Appeal from the Wayne Circuit Court.—HON. JOHN L. THOMAS, Judge.

AFFIRMED.

Benton & Edgar, for the appellant.

(1) The law transferring Wayne county from the twenty-third judicial circuit to the twenty-sixth judicial circuit had not gone into effect at the time of the trial of this case, and the court as organized had no jurisdiction to try the same and erred in overruling defendant's motion to continue. The laws of 1889 went into effect on the first of November and not the twenty-second of August. Sec. 3154; Declaratory Act, sec. 16; R. S. 1879, sec. 3149. (2) The court erred in admitting illegal, improper and irrelevant evidence offered by the plaintiff against the defendant's objection. *Kenney v. Railroad*, 70 Mo. 251; *Coale v. Railroad*, 60 Mo. 227. (3) The court erred in not sustaining the defendant's motion for a new trial, because the verdict was manifestly against the weight and preponderance of the evidence; against instructions of the court; excessive and manifestly the result of prejudice and sympathy; and was not reached by a fair application of the law to the facts. *Spohn v. Railroad*, 87 Mo. 84; *Baker v. Stonebraker's Adm'r*, 36 Mo. 345; *Price v. Evans*, 46 Mo. 396; *Herring v. Railroad*, 57 Ill. 59; *Reid v. Peidmont*, 58 Mo. 429; *Campbell v. Hood*, 6 Mo. 216; *Carroll v. Paul*, 16 Mo. 240. (4) The court erred in refusing to rebuke counsel for its ill-advised and ill-tempered language used during the progress of the production of

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the evidence calculated to inflame the passion and prejudice of the jury. *Holliday v. Jackson*, 21 Mo. App. 669. (5) The court erred in the instructions given to the jury on its own motion.

Dinning & Byrns, for the respondents.

(1) The circuit court of Wayne county had jurisdiction to hear and determine this case; hence it committed no error in overruling defendant's motion to continue. Session Acts, 1889, sec. 2, p. 67. Section 1140, Session Acts, 1889, went into effect twenty-second of August. Acts, 1889, sec. 1170, p. 68; sec. 3154; R. S. of Mo. 1879, sec. 3149, being R. S. 1889, sec. 6595; Constitution of Mo., sec. 36 of art. 4; Laws declaratory of the Revised Statutes, sec. 16, p. 149; Laws of Missouri, 1889; R. S. 1879, sec. 3129, being R. S. 1889, sec. 6574; R. S. 1879, sec. 3131, being R. S. 1889, sec. 6576; R. S. 1879, sec. 3132, being R. S. 1889, sec. 6577. (2) The court committed no error in the admission of evidence. (3) The presumption in this case is, that the plaintiff was injured by the negligence of the defendant, and the *onus* was on defendant, by satisfactory proofs, to establish that there had been no negligence whatever, and that the damage or injury had been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. *Lemon v. Chanslor*, 68 Mo. 340, and authorities therein cited; *Daugherty v. Railroad*, 97 Mo. 661; 1 Thompson on Neg., p. 46; Shear. & Redf. on Neg., sec. 280; *Edgerton v. Railroad*, 38 N. Y. 227; *Gilson v. Railroad*, 76 Mo. 287; *Leslie v. Railroad*, 88 Mo. 50; *Carroll v. Railroad*, 88 Mo. 252; *Hipsley v. Railroad*, 88 Mo. 352; *Wilkerson v. Railroad*, 26 Mo. App. 152.

THOMPSON, J., delivered the opinion of the court.

This is an action for damages by Mrs. Honeycutt (with whom her husband is joined for conformity), for

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an injury received while a passenger on a train of the defendant, in consequence of the car in which she was riding becoming derailed at a switch. The plaintiff had a verdict and judgment, and the defendant appeals.

I. The first error assigned is that the circuit court of Wayne county had no jurisdiction to try the case at the time and place at which the court was held, because the law (Acts of 1889, sec. 2, p. 67), by which Wayne county was transferred from the twenty-third to the twenty-sixth judicial circuit, did not take effect until the first day of November, 1889. This point is not well taken. The statute just cited not only transferred Wayne county from the twenty-third to the twenty-sixth judicial circuit, but it also *changed the time* of holding the circuit court of Wayne county; and section 16 of the act of 1889, "declaratory of the Revised Statutes" (Laws of 1889, p. 149), provides that "acts changing the time of holding courts shall take effect in ninety days after the adjournment of this session of the legislature." This clause refers to the entire acts and not to parts thereof. The act first cited changed the time of holding the circuit court of Wayne county, from the third Mondays of May and November at Greenville, and the fourth Mondays of May and November at Piedmont, as fixed by the act of April 5, 1887 (Laws of 1887, p. 153), to the first Mondays of February and August at Greenville, and to the third Monday in March and fourth Monday in September at Piedmont. Laws of 1889, p. 68. This act, therefore, since it contained a provision changing the time of holding courts, went into effect in ninety days after the adjournment of the legislature in regard to all provisions contained in it.

II. The next assignment of error is that "the court erred in admitting illegal, improper and irrelevant evidence offered by the plaintiffs against the defendant's objection." The record shows that a number of exceptions were saved by the defendant to the

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admission of evidence offered by the plaintiff. We do not know which one of these exceptions the defendant intends to bring to our attention by this general assignment of error. It is the duty of counsel in assigning errors to point out specifically the error complained of. It is no part of the duty of an appellate court to make a search of the record for possible errrors, much less, under a general assignment of error, like this one, to examine all the numerous rulings at the trial, to which it might by possibility be supposed to relate. *McGarry v. Railroad*, 36 Mo. App. 340, 345; *Schultz v. Moon*, 33 Mo. App. 329, 338.

III. The next assignment of error is "that the court erred in not sustaining the defendant's motion for a new trial, because the verdict was manifestly against the weight and preponderance of the evidence; against instructions of the court; excessive, and manifestly the result of passion and sympathy; and was not a fair application of the law to the facts." We take occasion also to say that this is not an apt way to assign errors. Several supposed errors are here thrown together into one general assignment. To the whole paragraph seven cases are cited; but to which supposed error each case is cited, we cannot tell without examining all of the cases. An assignment of errors is in the nature of a pleading. We have always treated assignments of error, when made in the printed statement and brief, as sufficient. But when errors are so assigned, in order to aid the court in its examination of them, each supposed error should be separately assigned, and cases should not be cited *en masse* to a collection of assignments of error, but the cases to which counsel ask the attention of the court, in connection with each assignment, should be cited to that assignment. We shall, nevertheless, treat these assignments of error as a general assignment, with certain specifications, that the verdict is the result of bias and prejudice.

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Some of the specifications are such as cannot be assigned in appellate courts in this state, under well-settled principles. Such is the assignment that "the verdict was manifestly against the weight and preponderance of the evidence. Appellate courts have nothing to do, in actions at law, with the mere weight and preponderance of the evidence. Another is that it was not reached "by a fair application of the law to the facts." This assignment falls within the same category as the last. Appellate courts cannot take upon themselves the office of juries for the purpose of determining what is a fair application of the law to the facts. It is not pointed out in what respect the verdict is against the instructions of the court, and we fail to see that it is.

The damages awarded by the jury were twenty-two hundred and fifty dollars. The car in which the plaintiff was riding was derailed and turned over. The leaders of her right hand were cut, and her hand was stiffened and crippled. She also suffered severe pain and anguish. In the opinion of an expert witness who testified for her, her fingers were permanently disabled. The verdict seems large; but it is a case where the jury necessarily have to give a round sum, and there is no rule of law by which we can determine what that sum should be. If the verdict is so large as plainly to show passion, prejudice or a disregard of the evidence on the part of the jury, it is our duty to set it aside, or to require a *remittitur;* but we cannot say this in the present case.

IV. The next assignment of error is that "the court erred in refusing to rebuke counsel for its ill-advised and ill-tempered language, used during the progress of the production of evidence, calculated to inflame the passion and prejudice of the jury." This assignment of error fails, because the exception taken to the refusal of the court to rebuke counsel was not renewed in the motion for new trial. *Bevin v. Powell,* 11 Mo. App. 216. It is just to the court, and to the

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counsel referred to, to add that, while the remark which was made by counsel, and which the court refused to rebuke, was an idle and hasty remark, not becoming the dignity and solemnity of a judicial trial, it was not calculated to inflame the passion or prejudice of the jury against the defendant.

V. It is assigned for error that the court erred in the instructions given to the jury on its own motion, but no argument or suggestion is offered in support of this assignment. These instructions seem to us to be strictly accurate and proper; and we may add that the court gave all the instructions requested by the defendant, and that the case seems to have been very fully and fairly submitted to the jury.

The judgment will be affirmed. It is so ordered. All the judges concur.

HENRY C. F. KOCH, Appellant, v. THOMAS W. HAWKINS, Respondent.

St. Louis Court of Appeals, April 29, 1890.

Ejectment: ASSESSMENT OF VALUE OF IMPROVEMENTS: NOTICE OF PROCEEDINGS TO PLAINTIFF IN EJECTMENT. If a plaintiff recover judgment in an action of ejectment, and the defendant, after the term of court at which the judgment was rendered, proceeds under the statute (R. S. 1879, sec. 2259) to recover compensation for improvements made by him in good faith on the land sued for, notice of this proceeding must be given to the plaintiff in the action; but, if the plaintiff is a non-resident, the plaintiff may be brought into court by publication for the purpose of such proceeding.

Appeal from the Marion Circuit Court.—HON. THOS. H. BACON, Judge.

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Reversed and remanded.

Bristow & Lighter, for the appellant.

The trial court, by its refusal to grant the peremptory writ of *mandamus*, held that it had jurisdiction to render the judgment set out in the case of Cook and Crane *v.* Koch. This was error, as the action, authorized by sections 2259 and 2260, Revised Statutes of 1879, is an independent suit, and the parties must be served with process or brought into court as in ordinary suits. See said sections; also, *Henderson v. Langley*, 76 Mo. 226; *McClannahan v. Smith*, 76 Mo. 428; *Jasper County v. Wadlow*, 82 Mo. 172; *Stump v. Hornback*, 94 Mo. 26. The judgment rendered is not authorized by the statute, even if the court had jurisdiction of the parties to render a judgment in the case. *Stump v. Hornback*, 94 Mo. 26.

H. J. Drummond, for the respondent.

(1) The court did not err in overruling the demurrer to respondent's return to the alternative writ of *mandamus*, because it showed that appellant was not entitled to the writ of restitution. Its issuance had been enjoined by the court. For the purpose of this injunction no notice was necessary. R. S. 1879, secs. 2714, 2261; High on Injunctions, sec. 32, p. 23. Injunction is the proper remedy in such cases. *Russell v. Defrance*, 39 Mo. 507–514. (2) The appellant was not entitled to the writ of restitution, because the return of respondent showed that the orders and decrees of the court in the proceeding for compensation for the improvements put on the land had not been complied with, and that appellant had been enjoined from taking possession of the land until he complied with them. The statute, chapter 30, Revised Statutes, 1879, pages 373 to 377, contemplates that the proceedings by an occupying

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claimant for compensation for improvements put on land, for which a judgment of eviction has been rendered against him, shall be had under the jurisdiction of the suit for eviction, and that the right to such proceeding originates in and grows out of that suit as a part thereof, and that no original process was necessary, or could have been obtained in this case, to bring appellant into court, and that he was already in for that purpose. The proceeding must be had in the court wherein the judgment of eviction was rendered. *Malone v. Stretch*, 69 Mo. 25. It must be instituted before the party claiming for improvements is evicted. *Malone v. Stretch*, 69 Mo. 27. To be effectual, it must be by injunction. Sec. 2261 of chap. 30, *supra*. And if service of original process was necessary, none could be had in the case of a non-resident (as in this) in time to prevent an eviction, and thus the purpose of the statute would be defeated. No original injunction writ could issue against a non-resident of the state, because it would have no effect on a person beyond its borders, as it operates only *in personam*.

Thompson, J., delivered the opinion of the court.

This is a proceeding by *mandamus* against the clerk of the circuit court of Marion county to compel him to issue an execution and writ of restitution in an action of ejectment, wherein the plaintiff recovered a judgment against Fred. Bogar and John C. Crane. The respondent made a return, showing that, at a term subsequent to the rendition of the judgment and prior to an eviction thereunder, H. A. Cook and John C. Crane (the latter one of the defendants in the ejectment suit) filed their petition under the provisions of the statute (Revised Statutes, 1879, section 2259, *et seq.*), praying for an injunction to stay the plaintiff from taking possession until they should be compensated for certain improvements made by them on the land as occupiers in good faith, and for certain moneys which they had

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advanced in payment of taxes thereon; that no process was issued thereon, because the plaintiff in the action of ejectment was a non-resident and could not be found in Missouri; that the plaintiff did not appear or make any defense to this petition, but that he was three times solemnly called and made default; and that the court thereupon, in his absence, heard the matter of the petition upon the pleadings and evidence, and made an order under said petition, in pursuance of the statute, and continuing the injunction against the plaintiff, which had been previously granted, until he should comply with such order. A demurrer to this return was overruled; the plaintiff declined to plead further, final judgment was accordingly rendered, and the plaintiff prosecutes this appeal.

The only question raised by the appellant is, whether the proceeding by petition for compensation for improvements is an independent suit in such a sense as requires the issue and service of new process, in order to give the court jurisdiction to make the order authorized by the statute.

The proceeding authorized by the statute is *sui generis*. The right to compensation for improvements is not given merely to the defendant in the action of ejectment, but is given where a judgment has been rendered in such an action "against a person in the possession, held by himself or by his tenant." In this case Bogar was the tenant in possession, and Cook and Crane, according to their petition for compensation, as described in the return, were his landlords. The proceeding is certainly in some respects an independent proceeding, in the nature or a separate section. This is shown by the case of *Russell v. Defrance*, 39 Mo. 506, where the pleadings in such a proceeding are set out. It is also shown by the language of the statute (section 2260 of the Revised Statutes of 1879), where the petitioner for compensation for improvements is described

as "the plaintiff," and his petition is called "his petition." It has been so regarded by the supreme court in a number of decisions. "It is," said HOUGH, J., "intended to be an independent proceeding, and can only be instituted after final judgment of dispossession shall have been rendered against the defendant in the suit of ejectment." *Henderson v. Langley*, 76 Mo. 226. To the same effect see *McClannahan v. Smith*, 76 Mo. 428; *Jasper County v. Wadlow*, 82 Mo. 172, 179–80. On the one hand, the court cannot enter judgment against the plaintiff in the action of ejectment for the value of the improvements, and enforce the same by execution, but the defendant must proceed under the statute. *Russell v. Defrance*, *supra*. On the other hand, he cannot proceed under the statute, after eviction, in another court, but must proceed before eviction and in the same court which rendered the judgment in ejectment. *Malone v. Stretch*, 69 Mo. 25. It is a fundamental principle of jurisprudence that a party cannot be affected by any proceeding in a court of justice of which he has had no notice, actual or constructive. Here it is perceived, the proceeding to have an order for compensation for improvements under the statute was instituted after the lapse of the term at which the judgment in ejectment had been rendered. It does not appear that it was instituted upon notice given to plaintiffs in ejectment, or to his attorneys, while the action of ejectment was depending. After the lapse of the term at which the judgment in ejectment was rendered, the parties to that action were out of court in such a sense that they could not be affected by further proceedings in that action, or by further supplementary or subsidiary proceedings, without being brought into court by a new notification in some form provided by law. *George v. Middough*, 62 Mo. 549. Where the law is silent as respects notice to a person whose interests are affected by a proceeding in court, the right to

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notice is always implied, and he must be brought into court in some appropriate way before he will be bound. *Ray County v. Barr*, 57 Mo. 290.

It has been argued that the question is governed by other provisions of the statute. By section 2261 of the Revised Statutes of 1879, it is provided: "An injunction may be granted to *stay the plaintiff* from taking possession of the land until the value of the improvements is ascertained, or until the further order of the court." The plaintiff here spoken of is the plaintiff in the action of ejectment. Section 2714 of the chapter of the same statutes relating to injunctions provides as follows: "When an injunction to *stay proceedings* is prayed in the same court where the proceedings were had, no notice of the application shall be necessary, unless prescribed by rules of court." We apprehend that this provision applies only to proceedings which are *pending* at the time when the application for the injunction to stay such proceedings is made. Manifestly it could not be made to apply for the purpose of staying execution on a judgment which has been rendered at a former term; for there the proceeding is ended, except for the purpose of execution, and the parties are out of court.

The return, by stating that the plaintiff was a nonresident; that no process was issued upon the filing of the petition for compensation for improvements, that plaintiff did not appear to defend against the same, but that an order was made upon an inquiry, as upon a judgment by default, inferentially shows that no notice of the proceeding of any kind was served upon him. It, therefore, impliedly shows that the order staying execution, and restitution was made by the court without jurisdiction, or, to say the least, it does not show that it was made with jurisdiction. It, therefore, states no defense to the petition for *mandamus*, and the demurrer to it should have been sustained. It follows

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that the judgment of the circuit court must be reversed and the cause remanded. No injustice need be done, since the defendants in the ejectment suit may obtain a preliminary restraining order under the statute, until a hearing on their petition is had, by filing the same and bringing the plaintiff in the ejectment suit into court by publication, unless he will enter his appearance therein by attorneys, who seem to represent his interests. As their prior proceeding is void for want of notice, it seems that they may proceed by a new petition, provided it is filed before eviction, which must be done in order to comply with the decision of the supreme court in *Malone v. Stretch*, 69 Mo. 25.

Judgment reversed and cause remanded. All the judges concur.

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INDEX.

BY BEN ELI GUTHRIE.

ABANDONMENT. See CRIMINAL LAW, 1, 2.

ABATEMENT.

ACTIONS FOR PERSONAL INJURIES—DEATH OF DEFENDANT.—An action for injuries to the person abates on the death of the defendant, but, if the death occur after judgment against the defendant, the judgment is valid until reversed, and an appeal therefrom is properly taken in the name of the defendant's executor. *Beck v. Dowell*, 71.

ACCEPTANCE. See CONTRACT, 4; WAIVER, 3.

BUILDING CONTRACT—POSSESSION—INSTRUCTION.—The fact of the owner's going into possession of the building cannot be taken by the jury as an acceptance of the work as done in compliance with the contract, but may be considered in connection with all the facts and circumstances shown in the case. *Boteler v. Roy*, 234.

ACCOUNT.

DEFENSE—PROTECTION IN SALE OF GOODS—CASE ADJUDGED.—Plaintiff sued for balance of account for sale of certain proprietary medicines. The defense was that plaintiff had agreed to protect the defendant in the sale of the goods, and, after he had been indicted for selling liquor in four cases, had told him to get a lawyer and fight the cases. After this defendant compromised the cases by pleading guilty to one indictment and being fined forty dollars and paying the costs in the others. *Held*, that the evidence did not sustain the defense; the condition to the plaintiff's liability to defendant was that he employ a lawyer and fight the cases; and defendant could not put a liability upon the plaintiff outside of the agreement. *Donnell Mfg. Co. v. Hart*, 512.

ACTION. See PLEADING, 11.

1. FOR PERSONAL INJURIES—DEATH OF DEFENDANT.—An action for injuries to the person abates on the death of the defendant, but, if the death occur after judgment against the defendant, the judgment is valid until reversed, and an appeal therefrom is properly taken in the name of the defendant's executor. *Beck v. Dowell*, 71.

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2. AT LAW—DEFENSE.—This is not an equitable proceeding, but properly an action at law, and the answer contained but one defense, partiality of the appraisers. *Leitch v. Miller*, 180.

3. AMENDMENT—CAUSE OF ACTION ARISING AFTER SUIT COMMENCED. In actions at law, whatever may be the rule in equity, the cause of action must be complete at the beginning of the suit; and filing an amended petition does not open up to plaintiff a cause of action accruing after the original petition was filed, and it operates only as a restatement of a cause of action existing at the beginning. *Davis v. Clark*, 515.

ADMINISTRATION.

ASSIGNMENT OF SHARE OF DISTRIBUTEE.—An assignment by a distributee of an estate of his share or interest therein, though made for value, passes such interest subject to the right of the administrator by suit in equity to have it applied to the satisfaction of indebtedness of the distributee to the estate. *Ford v. O'Donnell*, 51.

AFFIDAVIT. See ATTACHMENT, 1; JURISDICTION, 2.

AGENT. See EVIDENCE, 7; FRAUDULENT CONVEYANCES, 1; PRINCIPAL AND AGENT.

AMENDMENT. See ATTACHMENT, 1; JURISDICTION, 2; PRACTICE, TRIAL, 10.

1. CAUSE OF ACTION ARISING AFTER SUIT COMMENCED.—In actions at law, whatever may be the rule in equity, the cause of action must be complete at the beginning of the suit; and filing an amended petition does not open up to plaintiff a cause of action accruing after the original petition was filed, and it operates only as a restatement of a cause of action existing at the beginning. *Davis v. Clark*, 515.

2. FORCIBLE ENTRY AND DETAINER.—The circuit court, on appeal from the judgment of a justice of the peace in an action of unlawful detainer, may allow an amendment of the complaint, increasing the claim for damages. *Lucas v. Fallon*, 551.

APPEALS. See ATTORNEY, 2; JUSTICES' COURTS, 1, 6, 7, 8; REPLEVIN, 3, 4, 5.

1. VACATION OF PUBLIC ROAD.—The remonstrants in such a proceeding have the right of appeal to the circuit court from an order of the county court, vacating such road and assessing a part of the costs against them. *In re Big Hollow Road*, 363.

2. FROM THIS COURT TO SUPREME COURT.—*Held* (THOMPSON, J., *dissenting*) that an appeal does not lie from this court to the supreme court in an action wherein this court exercises original jurisdiction, notwithstanding that the determination of the cause involves a constitutional question. *State ex rel. v. Blakemore*, 406.

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3. COUNTY COURT—OPENING ROAD.—Petitioners in a public road have no such interest in the case as to carry with it the right of appeal from the judgment of the county court denying their petition. *Aldridge v. Spears*, 527.

4. THE SAME.—The road law permits appeals from the county court in certain specified cases; and from such enumeration the implication is clear that an appeal is denied in other cases, not specified, as the refusal of the petition to open a new road. *Ib.*

5. THE SAME—JUDGMENT.—In the determination of a petition for a public road, the county court does not act in a judicial capacity, and the refusal of such petition is not a judgment and no appeal will lie therefrom. *Ib.*

6. NEW BOND.—Circumstances considered, and an order in the circuit court requiring additional bond *held* erroneous in requiring such bond for an excessive amount. *Lucas v. Fallon*, 551.

7. PROHIBITION.—An appeal does not lie from the judgment of a lower court denying a writ of prohibition. *State ex rel. v. Bowerman*, 576.

8. JURISDICTION.—An action to rescind the sale and conveyance of land from the defendants to the plaintiffs on the ground of fraud, and to cancel a deed of trust and notes given for the purchase money by the plaintiffs to the defendants, especially if it is instituted after breach of the conditions of such deed of trust, involves title to land; and the supreme court alone has jurisdiction of an appeal in such cause. *Nearen v. Bakewell*, 625.

APPEARANCE. See ATTACHMENT, 2; JURISDICTION, 3.

APPOINTMENT. See CLERKS, 2.

APPRAISER. See ARBITRATION, 1.

APPRENTICES.

CUSTOM.—The apprenticeship of a minor is not valid or binding, unless made by indenture pursuant to the requirements of the statute. And a custom of otherwise apprenticing minors, being contrary to the mandate of the statute, is illegal. *Lally v. Cantwell*, 44.

ARBITRATION AND AWARD.

1. PREJUDICE OF APPRAISER—RESCISSION OF CONTRACT—VACATION OF AWARD.—L. sold M. a lease, and it was agreed that three appraisers should fix the price. The appraisers fixed the price and made it in two payments, the first of which M. paid, but refused to pay the second. L. then sued to recover the second payment. M. pleaded that one of the appraisers was prejudiced and the award was void. L. demurred and relied on the ground

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that the answer did not allege a return of possession of the leasehold. *Held:* (1) The answer was not an effort to rescind the contract, but was a defense within the contract. (2) It was as completely a feature of the submission to these appraisers, that each should be unbiased and unprejudiced, as if it had been so written in the body of the instrument. (3) The misconduct of one of the appraisers effectually vacates the entire award. *Leitch v. Miller*, 180.

2. WAIVER—INSTRUCTION.—An instruction telling the jury in effect, even though they should find the appraiser had prejudged the cause, yet, if they further find that defendant, previously to the hearing, knew of such judgment and suffered the hearing to proceed, they would find for the plaintiffs, is all, if not more, than was warranted in this case. *Ib.*

ARGUMENT. See EXCEPTIONS, 3.

ARCHITECT.

ARCHITECT'S CERTIFICATE AND EVIDENCE.—Though the contract makes the architect's certificate conclusive, in the absence of such certificate, his testimony will not be conclusive, but will be received on the same terms with any other witness of equal knowledge and opportunity. *Boteler v. Roy*, 234.

ASSIGNMENT.

ADMINISTRATION—ASSIGNMENT OF SHARE OF DISTRIBUTEE.—An assignment by a distributee of an estate of his share or interest therein, though made for value, passes such interest subject to the right of the administrator by suit in equity to have it applied to the satisfaction of indebtedness of the distributee to the estate. *Ford v. O'Donnell*, 51.

ATTACHMENT.

1. AFFIDAVIT FOR—AMENDMENT—JURISDICTION.—An affidavit for attachment, filed in the cause, though in proper form otherwise, which is not signed by the alleged affiant, and the *jurat* is neither signed by the clerk nor attested by the seal of the court, is a nullity, and cannot be amended, and confers no jurisdiction to issue a writ of attachment. *Third Nat. Bank v. Garton*, 113.

On motion for rehearing.

2. ——— ——— APPEARANCE.—On motion for rehearing the majority of the court adhere to the original opinion and hold in addition that the fact of defendant's appearing and pleading to a subsequently filed affidavit does not waive the necessity of a proper affidavit in the inception of the attachment proceeding, which is a proceeding *in rem*, and the means provided by the statute must be pursued to bring into the jurisdiction of the court the *res*, the property of the defendant. *Ib.*"

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3. VOLUNTARY CONVEYANCE—INTENT.—A voluntary conveyance of the husband to the wife made at a time when he was indebted beyond his ability to pay, the effect of which conveyance is to hinder and delay the creditors of the husband, is fraudulent and void as to such creditors and funishes ground for attachment, and the motives of husband in making such conveyance are wholly immaterial. *Cooper v. Standley*, 138.

4. HUSBAND AND WIFE—LAND BOUGHT WITH WIFE'S MONEY.—If the husband purchases land with money belonging to his wife, and holds the same for and in her behalf, then he might lawfully convey said land to her, and such transaction would not furnish grounds for attachment. *Ib.*

ATTORNEY. See DAMAGES, 7.

1. EMPLOYMENT OF.—An attorney may be employed by a corporation to prosecute a suit in its behalf without a formal resolution of its board of directors, authorizing such employment. *President Mining & Milling Co. v. Coquard*, 40.

2. JUSTICES' COURTS—NOTICE OF APPEAL—ATTORNEY AND AGENT. The service of notice of an appeal from a justice's court upon an attorney employed to try the case in the courts of the county by the appellee, a non-resident of the county, is sufficient compliance with the statute. The evidence in this case examined and the party served found to be the agent and attorney of the appellee. *Bensberg v. Turk*, 227.

AWARD. See ARBITRATION, 1.

BANKS AND BANKING.

BANK CHECKS—LACHES IN PRESENTATION.—The drawer of a check is not discharged by the laches of the holder in presenting it for payment, unless he is injured by such laches; and, if injured by such laches, he is released from liability only to the extent of such injury. *Graham v. Morstadt*, 333.

BENEFIT SOCIETIES.

1. MUTUAL BENEFIT INSURANCE.—Provisions in the by-laws of a benevolent association, requiring a certain form of notice of assessments for mutual benefit insurance to be given to members under a corporate or official seal, and providing that no paper issued by authority of the association should be official unless thus sealed, may be waived. And the evidence is sufficient to warrant a finding of such a waiver when it establishes an unbroken usage for years on the part of the association to give notices of assessments not thus sealed, and on the part of all the members of the association, including the beneficiary in the case in hand, to treat such notices as sufficient. *Heffernan v. Supreme Council Amer. Legion of Honor*, 605.

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2. APPELLATE PRACTICE.—The fact that the weight of the evidence in an action at law is with the appellee will not prevent a reversal of the judgment appealed from, when there was prejudicial error in the trial of the cause. *Ib.*

BILLS AND NOTES.

COMAKER—INDORSER.—Proof that a note was negotiated by the maker of it is not sufficient to charge as a comaker one, whose name appears on the back thereof, after the name of the payee. *Marshall v. Cabanne*, 88.

BILLS OF EXCEPTIONS. See CERTIORARI, 1; COUNTY COURT, 1.

CRIMINAL LAW.—Exceptions to the action of the trial court on motions in a criminal case for a bill of particulars, and to quash the indictment, are waived, unless preserved in the motion for new trial. *State v. Quinn*, 627.

BURDEN OF PROOF.

1. MASTER AND SERVANT.—The burden of proving in such case, in mitigation of damages, what the servant earned, or could have earned during the period of time in question, is on the defendant. And proof that the servant secured other employment during such period, without any evidence as to what was earned by him, *held* not to entitle the defendant to complain that the jury did not make sufficient allowance for such earnings in their verdict. *Lally v. Cantwell*, 44.

2. SALE ADMITTED—FRAUD PLEADED—HARMLESS ERROR.—Where plaintiff's answer to an interplea in an attachment suit admits the sale and transfer of possession to the interpleader, but pleads fraud in avoidance thereof, the burden of proof is on the plaintiff to show the fraud, but a direction of the court to the parties before the testimony began, that the burden was on the interpleader to show *prima facie* the ownership of the goods attached, is, under the circumstances of this case, harmless error. *Meyberg v. Jacobs*, 128.

3. NEGLIGENCE—DANGER.—In a suit for such injuries the plaintiff establishes a *prima facie* case by proof that he was a passenger on the railroad car and that he received the injuries complained of in consequence of the derailment of the car; the burden of proof is then upon the railroad company to show that there were no acts of negligence, either of omission or commission, by any of its servants contributing to the accident, and that the derailment of the car was occasioned by inevitable casualty which the utmost skill and diligence could not have prevented, or by the act of a stranger which it, the railroad company, could not have foreseen or anticipated. *Dimmitt v. Hannibal & St. J. Ry. Co.*, 654.

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4. PRESUMPTIONS—FRAUDULENT CONVEYANCES.—Evidence of the possession of the property by a claimant of it is *prima facie* evidence of his ownership of it; and in the trial of an issue, whether the sale of that property to such claimant was fraudulent as against the creditors of the vendor, who attack the *bona fides* of the transaction, such creditors have the burden of showing the sale to have been fraudulent. *Martin v. Fox*, 664.

CERTIORARI.

1. OFFICE OF.—*Certiorari* only brings up the record of the inferior court, and its office is to reach only such defects or errors in the proceedings as appear upon the face of the record. *State ex rel. v. Cauthorn*, 94.

2. COUNTY COURTS—BILL OF EXCEPTIONS.—There is no provision of law providing for a bill of exceptions in the county courts, and so a *certiorari* can only reach the record proper thereof. *Ib.*

CHATTEL MORTGAGES.

1. MORTGAGEE PURCHASING AT HIS OWN SALE.—The mortgagee cannot legally become a purchaser at his own sale, unless authorized or consented to by the parties in interest, and this, without regard to the *bona fides* of the sale or the fairness of the price, as the rule is intended not to remedy actual wrong but to prevent the possibility of it. *Moore v. Thompson*, 195.

2. EQUITY OF REDEMPTION—SECOND MORTGAGEE.—The surplus of the mortgaged chattels left after paying a first mortgage is pledged to secure the debt of a second mortgage, and is the property of the second mortgagee and not of the mortgagor, so that the latter's consent to the first mortgagee's purchasing at his own sale cannot cut off the right of the second mortgagee to redeem. *Ib.*

3. EQUITY—CONVERSION—REMEDY.—When a court of equity has established the right to redeem, but the mortgagee has consumed or disposed of the property, so that it cannot be redeemed in kind, it may enter a personal decree against the mortgagee for the excess of the value of the property over the amount found due on the mortgage. *Ib.*

CHECKS.

BANK CHECKS—LACHES IN PRESENTATION.—The drawer of a check is not discharged by the laches of the holder in presenting it for payment, unless he is injured by such laches; and, if injured by such laches, he is released from liability only to the extent of such injury. *Graham v. Morstadt*, 333.

CLERKS.

1. CIRCUIT CLERKS—RIGHT TO RESIGN WHILE SUSPENDED FROM OFFICE.—The suspension of a clerk of the circuit court from office, pursuant to an order of the circuit judge, does not disable such clerk from resigning his office or abate his right to resign. *State ex rel. v. Blakemore*, 406.

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2. ——— AUTHORITY OF GOVERNOR TO FILL VACANCY.—Such resignation causes a vacancy in the clerkship which the governor has the right to fill by appointment, notwithstanding that the circuit court has previously appointed a temporary clerk, who holds the office at the time of the appointment by the governor. *Ib.*

CLUBS.

SELLING INTOXICATING LIQUORS.—The "make-up" of a club room was in all respects similar to that of an ordinary dramshop; and the dram seeker was required to sign the articles of association and pay an admission fee of twenty-five cents, which clothed him with the privileges of membership and entitled him to buy and drink at the place whatsoever was carried in stock by purchasing a "requisition ticket," paying therefor ten or five cents as he might desire whiskey or beer. *Held,*—

(1) The transaction was a sale regardless of the purchaser's relation to the association, whether member or stranger.

(2) The refusal of the trial court to admit the "articles of association," etc., in evidence was harmless to the defense.

(3) That the defense was void of merit. *State v. Tindall,* 271.

COMMON CARRIERS.

1. LIMITATION OF LIABILITY.—A common carrier cannot, by contract, limit the extent of his liability for his negligence. And a stipulation by the carrier that his liability should not exceed a stated sum, unless the value of the property should be disclosed, will not relieve the carrier from liability for the actual value of the property, in case of the loss thereof through his negligence in the carriage of it, though the shipper, on demand by the carrier, refused to state the amount of its value, and though a larger charge would have been made for its carriage and it would have been differently carried than was done, if such value had been disclosed. *Conover v. Pacific Express Co.,* 31.

2. LIQUIDATED DAMAGES.—But *semble* that an agreement between the carrier and shipper fixing the value of the property, and liquidating the damages for the loss of the property at the value thus fixed, is valid, if made for a sufficient consideration. *Ib.*

3. NOTICE OF DAMAGE—WAIVER.—A contract of shipment required that the plaintiff, in case of damage in transportation, would, in twenty-four hours after arriving at the point of destination, give notice thereof in writing, verified by affidavit, to some general officer of the defendant, etc. The plaintiff within such time handed an unverified letter containing an account of his loss to defendant's general freight agent, who received the same, made

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no objection thereto, either as to form or substance, and promised to look up and adjust the claims. *Held*, this was sufficient notice and a waiver of the requirement that it should be sworn to. *Hess v. Mo. Pac. Ry. Co.*, 202.

COMMON LAW.

HUSBAND AND WIFE—CHATTELS OF WIFE—STATUTORY SEPARATE PROPERTY.—In the absence of proof the Missouri courts will presume the common law in force in Illinois. While at common law the chattels of the wife vested in the husband by virtue of the marriage, yet he could waive his rights thereto and permit her to retain them released from the husband's marital rights. And where, as in this case, the wife's money was set aside to her in Illinois, it became her separate means, and as such she brought it to this state, where it was impressed with the provisions of our laws and was her statutory separate property, of which her husband could not deprive her, without her assent in writing. *Cooper v. Standley*, 188.

CONDEMNATION PROCEEDINGS. See DAMAGES, 6, 7.

CONSIDERATION.

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE.—Where a wife in Illinois received money from her father's estate, which her husband then spent in improving his own real estate, and, upon his selling the same, the wife refused to join in the deed except upon receiving her money back which was accordingly paid her, and which she took and claimed as her separate means; and, upon removing to Missouri, the husband used the same in purchasing real estate and took the title thereto in himself, *held*, these facts constituted the money the separate property of the wife and furnished a good consideration for a conveyance from the husband to the wife. *Cooper v. Standley*, 188.

2. PRINCIPAL AND SURETY.—An agreement, whereby one binds himself as surety for the performance by a contractor of a contract for the erection of a building, is invalid, if it is made after such contract has been entered into between such contractor and the party contracting with him, and without any new consideration. *Lafayette Building Ass'n v. Kleinhoffer*, 388.

CONSTABLE. See COSTS, 8.

CONSTRUCTION.

1. SPECIAL WORDS V. GENERAL WORDS—RULE.—When a deed first speaks in general words, and afterwards in special words, and the latter accord with the former, this deed shall operate according to the special words, whether they enlarge or restrain the general words that precede; and where, as in this case, a deed for a right of way described the grant as a hundred feet in width

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through, etc., a certain tract, including a dwelling house, and subsequent special words described it as fifty feet on the north, and fifty feet on the south, side of the center of the track of the railroad of the grantee, as the same may be finally located and constructed over said tract, etc., the special words authorize the appropriation of any other strip of the grantor's land upon which the grantee might finally change the location of its line. *Ells v. Mo. Pac. Ry. Co.*, 165.

2. SPECIFICATIONS—COMPLETION.—The contract required the work to be done "without unnecessary delay as soon as ordered;" the specifications (made a part of the contract) recited: "The building will be completed * * * within three months from the date of the contract." The defendant only contracted to do the carpenter work. *Held*, the contract controlled the specifications and did not require the defendant's work to be finished within three months. *Boteler v. Roy*, 234.

3. INSTRUCTION—POSSESSION—INDEFINITE DESCRIPTION—INTENTION OF GRANTOR.—In a contest between two grantees of the same grantor, where the older conveyance was indefinite in its description of the premises intended to be conveyed, it is not *error* to admit parol evidence as to the intention of the grantor to convey to the older grantee the land claimed to be embraced in the conveyance to the subsequent grantee, and to instruct the jury that, if the grantors in the former conveyance intended and understood they were conveying the premises in dispute to the grantees therein, and that said grantees, believing said deed, conveyed said premises to them, and, under and by virtue thereof, took possession of said premises, and have ever since that time—more than ten years—held possession thereof, and now have possession of the same, then said former grantees are entitled to recover, etc. *Thornton v. Mo. Pac. Ry. Co.*, 265.

4. CONTRACTS.—When several instruments are executed at the same time in relation to the same subject-matter and to accomplish a common purpose, and the execution thereof is known to every party to either instrument, they should be construed as one contract, though the parties to each instrument are not the same. *MacDonald v. Wolff*, 302.

5. COSTS—STATUTORY ONLY.—Costs can only be recovered where expressly authorized by statute; and all statutes relating to costs must be strictly construed. *In re Green*, 491.

6. GUARANTY—SINGLE OR CONTINUOUS DEALING—RULE OF CONSTRUCTION.—When it is doubtful from the language contained in the contract whether the guaranty was for a single dealing or for a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed

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the other party to have accepted it, if in fact he did accept it; so where M., a tenant of defendant, placed orders for goods to the amount of thirteen to seventeen hundred dollars with plaintiffs, wholesale merchants, who thereupon told defendant, if he would guarantee the payment of thirteen hundred dollars, they would fill the orders and take their chances on the excess; and plaintiffs then executed this writing: "I hereby guarantee the payment of bills as they mature purchased by M. of R. P. Smith & Sons * * * to the amount of thirteen hundred dollars," *held*, said writing was not intended to be a continuing guaranty. *Smith v. Van Wyck*, 523.

7. LAWS—TIME OF TAKING EFFECT.—Under section 16 of the act of 1839, "declaratory of the Revised Statutes," the law of 1889, changing the time for the holding of the circuit court of Wayne county, took effect as to all its provisions, and not merely as to that providing for such change, ninety days after the adjournment of the legislature. *Honeycutt v. St. Louis, I. M. & S. Ry. Co.*, 674.

CONTRACTS.

1. QUANTUM MERUIT.—In an action of *quantum meruit* for services rendered, a recovery is not warranted in the absence of evidence either of the reasonable value of the services or of a special contract fixing the rate of compensation. The evidence in this cause considered, and *held* by a majority of the court not to support the verdict. *Sanford v. Cape Girardeau & S. W. Ry. Co.*, 15.

2. ——— ACTION ON CONTRACT CHANGED TO.—On an examination of the evidence the court is confident plaintiff's action should be *quantum meruit*. *Mohney v. Reed*, 99.

On rehearing.

3. INDUCEMENT—QUANTUM MERUIT.—On a further examination the court is confirmed in the opinion that this action is on a written contract for building a house and not upon *quantum meruit*, and that the contract is not pleaded as an inducement to another action. *Ib.*

4. WAIVER—BUILDING CONTRACT—ACCEPTANCE—KNOWLEDGE. — In building contracts, where the house is built upon the property of him who has it built, acceptance and use of the work, knowing it was not done in accordance with the contract, is not a waiver. *Ib.*

5. GROWING TIMBER—LICENSE.—An unsealed and unacknowledged written contract, whereby, for a valuable consideration to be thereafter paid, growing timber on a certain piece of land is sold, is a mere executory contract and conferred but a license to remove the trees. *Potter v. Everett*, 152.

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6. Arbitration and award—prejudice of appraiser—rescission of contract—vacation of award.—L. sold M. a lease, and it was agreed that three appraisers should fix the price. The appraisers fixed the price and made it in two payments, the first of which M. paid, but refused to pay the second. L. then sued to recover the second payment. M. pleaded that one of the appraisers was prejudiced and the award was void. L. demurred and relied on the ground that the answer did not allege a return of possession of the leasehold. *Held:* (1) The answer was not an effort to rescind the contract, but was a defense within the contract. (2) It was as completely a feature of the submission to these appraisers, that each should be unbiased and unprejudiced, as if it had been so written in the body of the instrument. (3) The misconduct of one of the appraisers effectually vacates the entire award. *Leitch v. Miller*, 180.

7. Breach—insufficient reason.—Defendant agreed to deliver to plaintiffs during August ten carloads of wheat. He delivered three carloads and drew his draft on plaintiffs for more than the three carloads came to. Plaintiffs paid what the three carloads amounted to and not the excess. Defendant notified plaintiffs the contract was at an end, as he would not ship wheat to any house that would not pay his drafts, whether they were for too much or not too much. *Held* the reason was insufficient, and it was not necessary thereafter for plaintiffs to tender the contract for the remainder of the wheat. *Price v. Vanstone*, 207.

8. Building contract—architect's certificate—condition precedent.—A stipulation in a building contract that payment shall be made on the estimate and certificate of the architects is a condition precedent and should be pleaded, and its performance alleged and proved. But no special statement of facts showing performance is necessary; a general statement that the party has performed all the conditions of the contract on his part is sufficient under the statute of this state. *Roy v. Boteler*, 213.

9. Building contract—architect's certificate, sufficiency of —evidence.—The contract required the certificate to be under the hand of the architects, and to show (1) that the whole job had been completed and accepted by the architects, (2) the final estimate by the architects of the amount due on the contract, and (3) that the work had been performed agreeably to the drawings and specifications under the direction and to the satisfaction of the architect. The certificate showed the balance due the contractor, but nothing more. *Held*, the certificate was in substance insufficient, failed to show the compliance with the contract. *Ib.*

10. Pleading—waiver--evidence-architect's certificate.—Under a general allegation of performance of all the conditions of a contract, evidence of a waiver of performance of such conditions

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is inadmissible, and the fact that an architect's certificate may have been made in a certain manner at the defendant's request cannot alter the rule; but modifications or alterations of the contract, and a waiver or estoppel must be pleaded. *Ib.*

11. BUILDING CONTRACT — SUBSTANTIAL PERFORMANCE — TRIVIAL DEFECTS—INSTRUCTIONS.—In an action by the owner against the contractor for breach of contract for building a house it is *error* to instruct the jury that if defendant had substantially performed his contract according to the plans and specifications that plaintiff could not recover, even though these were trivial defects. *Boteler v. Roy*, 234.

12. ——— ACCEPTANCE—POSSESSION—INSTRUCTION.—The fact of the owner's going into possession of the building cannot be taken by the jury as an acceptance of the work as done in compliance with the contract, but may be considered in connection with all the facts and circumstances shown in the case. *Ib.*

13. ——— SPECIFICATIONS—CONSTRUCTION—COMPLETION.—The contract required the work to be done "without unnecessary delay as soon as ordered;" the specifications (made a part of the contract) recited: "The building will be completed * * * within three months from the date of the contract." The defendant only contracted to do the carpenter work. *Held*, the contract controlled the specifications and did not require the defendant's work to be finished within three months. *Ib.*

14. ——— ARCHITECT'S CERTIFICATE AND EVIDENCE.—Though the contract makes the architect's certificate conclusive, in the absence of such certificate, his testimony will not be conclusive, but will be received on the same terms with any other witness of equal knowledge and opportunity. *Ib.*

15. INDEPENDENT AGREEMENTS.—The mutual contracts of two contracting parties are independent, and a breach by one of the parties of an agreement to be performed by him is no defense to an action instituted by him against the other party for a breach of the agreement on the part of the latter, if the agreements of the several parties, thus broken, were to have been performed at different times, and if the agreement violated by the party suing goes only to a part of the consideration for that violated by the party sued, and compensation for the violation of it can be made in damages. *Sawyer v. Christian*, 295.

16. WHEN SEVERAL INSTRUMENTS are executed at the same time in relation to the same subject-matter and to accomplish a common purpose, and the execution thereof is known to every party to either instrument, they should be construed as one contract, though the parties to each instrument are not the same. *McDonald v. Wolff*, 302.

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17. INFANT—DISAFFIRMANCE OF CONTRACT.—An infant who purchases a chattel, and, to secure the payment of the purchase money, gives a mortgage on such chattel and other personal property of his own, may, if the vendor under the mortgage takes possession of the chattel sold and is thus placed *in statu quo*, disaffirm the mortgage, and thus release the additional property covered by it; and an action of replevin for such additional property, instituted by him, but dismissed without being prosecuted to a final judgment, is a sufficient disaffirmance. *Stotts v. Leonhard*, 336.

18. DONATIO CAUSA MORTIS.—A gift made by a decedent in contemplation of, and immediately prior to, his death, and consummated by delivery is valid. *Nelson v. Sudiek*, 341.

19. MARRIED WOMEN.—A married woman cannot by ratification or renewed promises render effective a promise, which was made by her while she was unmarried, but which did not become binding on her prior to her marriage. *Saulsbury v. Corwin*, 373.

CONVERSION. See EQUITY, 1.

1. AGENT—ACT OF HOSTILITY TO TRUE OWNER.—One who finds himself in possession of property belonging to another, yet does nothing with the property or to the property in hostility to the true owner, is not guilty of conversion; if an agent, however, does that (in this case sells fatted beef cattle, in the usual course, for slaughter and consumption) which cuts off the true owner's remedy to follow his property and hold him liable in whose hands he may discover it, he should be held in conversion, notwithstanding his ignorance of the true owner's claim. *LaFayette County Bank v. Metcalf*, 494.

2. ——— MORTGAGE—RECORD NOTICE.—If a mortgagor rightfully in possession of mortgaged cattle delivers the same to his commission merchant, who without actual notice of the mortgage sells and accounts to him for the proceeds, the merchant will be liable to the mortgagee for conversion, as the record of the mortgage gave notice to all dealing with the cattle whether within or without the state, and took the place of a change of possession and the case stands as if the cattle had been taken from the mortgagee's possession by the mortgagor. *Ib.*

3. MORTGAGE—SALE BEFORE DEFAULT.—A mortgagor in possession may, generally before condition broken, sell and deliver the mortgaged property, but such sale must be in recognition of, and not in antagonism to, the mortgage; and, if the sale is such as purports to convey complete title, the mortgagee has immediate right to the possession; and, if the mortgagor's vendee destroys the property or materially alters its condition, it is a conversion, and the mortgagee has his action. *Ib.*

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4. ——— DEMAND.—The office of a demand is evidential and not creative. A wrongful sale constitutes an actual conversion and when shown dispenses with a demand. *Ib.*

5. RATIFICATION—INSTRUCTION.—An instruction telling the jury that in order to find a ratification they must believe plaintiffs knew of the sale and that the money paid them arose from said sale is approved under the facts in this case. *Ib.*

CORPORATIONS.

1. INSOLVENT—DEBTS OF.—The insolvency of a corporation, and its discontinuance of the business for which it was organized, does not deprive it of the power of collecting and enforcing in its own name claims due to it. *President Mining & Milling Co. v. Coquard*, 40.

2. EMPLOYMENT OF ATTORNEY.—An attorney may be employed by a corporation to prosecute a suit in its behalf without a formal resolution of its board of directors, authorizing such employment. *Ib.*

3. LAW of the state of Illinois considered and *held* that, under it, a corporation has the right to acquire shares of its own capital stock. *Eggmann v. Blanke*, 318.

4. SEALS.—A corporation can only execute a formal bond with its corporate seal, countersigned by an officer entitled to affix its seal. *South Mo. Land Co. v. Jeffries*, 360.

COSTS.

1. RIGHT OF PARTIES TO ENTER SATISFACTION.—The costs taxed in a cause belong to the persons to whom they are payable, when collected; and a fee bill or execution may issue for unpaid costs, due to officers of the court, notwithstanding an acknowledgment of satisfaction of the judgment by the party in whose favor it was rendered. *State ex rel. v. Ashbrook*, 64.

2. STENOGRAPHER'S FEE.—A garnishment proceeding is not "a case" within the meaning of the act of 1887 for the taxation in every case of a stenographer's fee of three dollars, and such fee is accordingly not taxable as costs in such a proceeding. *Mechanics & Traders' Bank v. Glaser Bros.*, 371.

3. STATUTORY ONLY—CONSTRUCTION.—Costs can only be recovered where expressly authorized by statute; and all statutes relating to costs must be strictly construed. *In re Green*, 491.

4. CIVIL ACTION.—An action against a railroad company to recover the penalty prescribed by section 806, Revised Statutes, 1879, is a civil action and in its nature *qui tam;* and costs should be taxed according to the statute relating to costs in civil, and not in criminal, cases. *Ib.*

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5. ACTION FOR, HOW BROUGHT—TAXATION OF COSTS.—The action for such penalty under said section should be brought in the name of the state at the relation of the prosecuting attorney, on the information of the informer, and against the railroad company; and, in case the action is unavailing, the informer, who is the real actor and the party beneficially interested in the suit, should pay the costs. *Ib.*

6. CRIMINAL—SEDUCTION—COUNTY LIABLE—PROSECUTRIX NOT.—On an indictment for seduction, where a *nolle prosequi* is entered on the defendant's marrying the prosecutrix, the county is liable for the costs of prosecution. Prosecutrix, in such case, cannot be adjudged liable therefor. *State ex rel. v. Platte County Court*, 503.

7. COSTS OF JUSTICES OF THE PEACE.—A justice of the peace is not deprived of his proper fees in criminal prosecution before him for vagrancy under the statute of the state, by reason of the fact that he is also a recorder of a town, whose ordinances authorized similar prosecutions for vagrancy before him as such recorder. *State ex rel. v. Heege*, 650.

8. COSTS OF TOWN CONSTABLE.—If the charter of a town authorizes a board of trustees to appoint a town constable or marshal and to prescribe his duties by ordinance, and an ordinance is accordingly adopted by such board, by which he is given all the powers and duties of a constable of any municipal township, such ordinance is valid, and a town constable or marshal so appointed is entitled to the same costs in criminal prosecutions in such town under the statutes of this state as would be allowed to an ordinary constable. *Ib.*

COUNTY COURT. See CRIMINAL LAW, 14; MANDAMUS, 1.

1. CERTIORARI—BILL OF EXCEPTIONS.—There is no provision of law providing for a bill of exceptions in the county courts, and so a *certiorari* can only reach the record proper thereof. *State ex rel. v. Cauthorn*, 94.

2. JURISDICTION—DRAMSHOP LICENSE.—A petition for a dramshop license need not, in order to confer jurisdiction on the county court, aver in the language of the statute that the petitioners compose a majority of the assessed taxpaying citizens, etc. If such jurisdictional facts are made to appear in other parts of the record, it is sufficient to give jurisdiction and render its action valid. (*Distinguishing*, *State ex rel. v. Heege*, 37 Mo. App. 338.) *Ib.*

CRIMINAL LAW. See INDICTMENT, 1, 2.

1. ABANDONMENT OF WIFE—INFORMATION.—An information, charging an abandonment of the wife and a failure to provide for her, is sufficient, if it charges the offense in the language of the statute. (R. S. 1879, sec. 1273.) *State v. Brinkman*, 284.

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2. ——— ESSENTIAL ELEMENTS OF OFFENSE.—To establish a case of the criminal abandonment of a wife by the husband and his failure to support her, the state must establish not only that the husband abandoned and failed to provide for the wife, but also a criminal intent on his part to abandon his wife without good cause. *Ib.*

3. APPELLATE PRACTICE.—When the evidence in the trial of a criminal prosecution is insufficient in law to establish the offense charged, the defendant, on appeal, is entitled to a discharge in the appellate court. *Ib.*

4. INDICTMENT.—An indictment against judges of a county court for illegally exacting and collecting mileage *held* too indefinite, owing to the absence of any specification of the fees claimed to have been illegally exacted and collected. *State v. Couch*, 325.

5. PRESCRIPTION OF INTOXICATING LIQUORS BY PHYSICIAN.—An indictment, charging a physician with having criminally prescribed intoxicating liquors contrary to the statute (R. S. 1879, sec. 5476), is insufficient, if it does not charge that the physician issued the prescription for the purpose of enabling the liquor to be obtained and used otherwise than for medicinal purposes; a charge that the liquor was used not for medicinal purposes, but as a beverage, will not suffice. *State v. Umphrey*, 327.

6. INFORMATION—DISTURBING WORSHIP.—An information for the disturbance of a religious meeting is sufficiently definite. if it charges the offense in the terms of the statute. *State v. McDaniel*, 356.

7. INFORMATIONS.—An information must be based either upon the personal knowledge of the prosecuting attorney, or upon that of some private person, who lodges with the prosecuting attorney a complaint setting forth the facts, and verifies the same by his affidavit. *State v. Hatfield*, 358.

8. COSTS—SEDUCTION—COUNTY LIABLE—PROSECUTRIX NOT.—On an indictment for seduction, where a *nolle prosequi* is entered on the defendant's marrying the prosecutrix, the county is liable for the costs of prosecution. Prosecutrix, in such case, cannot be adjudged liable therefor. *State ex rel. v. Platte County Court*, 503.

9. SELLING LIQUORS WITHOUT LICENSE—SUFFICIENCY OF THE EVIDENCE.—In a proceeding under a statute or municipal ordinance subjecting persons to a fine for the sale of liquors without license, a single sale is sufficient to support a conviction. *City of Springfield v. Ford*, 586.

10. BILL OF EXCEPTIONS.—Exceptions to the action of the trial court on motions in a criminal case for a bill of particulars, and to quash the indictment, are waived, unless preserved in the motion for new trial. *State v. Quinn*, 627.

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11. Bill of particulars.—The practice of demanding a bill of particulars in a criminal case has never prevailed in this state. *Ib.*

12. Druggists—sale of intoxicating liquor.—Evidence that the defendant was a registered druggist, and that a merchant's license for drugs was issued to him, though such license did not contain the given name of the defendant, is sufficient evidence of the occupation of the defendant as druggist within the purview of section 2 of the act of March 29, 1883, concerning the sale of intoxicating liquors by druggists, and the statute of which it is amendatory. *Ib.*

13. The same.—A sale of whiskey at the drugstore of defendant by a person then in charge of such store and attending to the defendant's business, *prima facie*, establishes a sale by the defendant within the meaning of said section 2. *Ib.*

14. Action of county court in auditing fee bills—mandamus.—A county court acts ministerially in auditing the fee bills of justices of the peace and constables for costs in criminal cases, after the proper certification thereof by the judge of the circuit court and the prosecuting attorney; and *mandamus* is a proper remedy, if a county court refuses to perform its duty in this respect. *State ex rel. v. Heege*, 650.

15. Costs of justices of the peace.—A justice of the peace is not deprived of his proper fees in criminal prosecutions before him for vagrancy under the statute of the state by reason of the fact that he is also a recorder of a town, whose ordinances authorized similar prosecutions for vagrancy before him as such recorder. *Ib.*

16. Costs of town constable.—If the charter of a town authorizes a board of trustees to appoint a town constable or marshal and to prescribe his duties by ordinance, and an ordinance is accordingly adopted by such board, by which he is given all the powers and duties of a constable of any municipal township, such ordinance is valid, and a town constable or marshal so appointed is entitled to the same costs in criminal prosecutions in such town under the statutes of this state as would be allowed to an ordinary constable. *Ib.*

CUSTOM.

Apprentices.—The apprenticeship of a minor is not valid or binding, unless made by indenture pursuant to the requirements of the statute. And a custom of otherwise apprenticing minors, being contrary to the positive mandate of the statute, is illegal. *Lally v. Cantwell*, 44.

DAMAGES. See Personal Injury, 2; Pleading, 5; Waiver, 4.

1. Liquidated damages—common carriers.—But *semble* that an agreement between the carrier and shipper fixing the value of

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the property, and liquidating the damages for the loss of the property at the value thus fixed, is valid, if made for a sufficient consideration. *Conover v. Pacific Express Co.*, 31.

2. MASTER AND SERVANT.—When a person is held liable for wrongfully and maliciously procuring the discharge of a servant by his master, the measure of damages is the same as in the case of a suit by the servant against the master for a wrongful discharge. *Lally v. Cantwell*, 44.

3. EVIDENCE OF PLAINTIFF'S PECUNIARY CONDITION.—When a case warrants exemplary damages, evidence of the pecuniary condition of the plaintiff, and of the plaintiff's family, is admissible; and the admission thereof is not error, if the evidence in the cause at the time would have authorized the assessment of such damages by the jury. *Beck v. Dowell*, 71.

4. EXCESSIVE VERDICT.—A verdict for seven hundred and fifty dollars *held* not excessive as compensatory damages for a painful flesh wound through the thigh, made by a pistol shot. *Ib.*

Per Biggs, J., dissenting:

5. EVIDENCE OF PECUNIARY CONDITION OF PLAINTIFF AND FAMILY. In an action for personal injuries, evidence of the pecuniary condition of the plaintiff or of her family is inadmissible, even when the facts of the case are such as to warrant exemplary damages. *Ib.*

6. CONDEMNATION PROCEEDINGS--ABANDONMENT AND REINSTITUTION OF.—When proceedings for condemnation are dismissed, notwithstanding they may have been reinstituted, the party instituting them will be liable in an action for damages occasioned by the first, unless such damage was adjudicated in the second; and whether they were so adjudicated is a question which may be tried, as was done in this case, by submitting it to the jury on evidence. *Gibbons v. Mo. Pac. Ry. Co.*, 146.

ATTORNEY'S FEE—EVIDENCE—EXPERT TESTIMONY.—An attorney's fee in a first condemnation proceeding is a proper element of damage, provided it is a reasonable one, and the court incline to the opinion, in the absence of evidence to the contrary of that offered by the plaintiff, that the fee in question was reasonable, though no lawyers were called to show it reasonable, as jury are not confined to the testimony of experts in fixing the value of professional services. *Ib.*

8. NUISANCE—DAMAGES TO THE INHERITANCE—LOSS OF RENTS.—In an action to recover damages for the creation of a nuisance where the evidence tended to show that the injury to plaintiff's premises were such that they did not stop with the existence of a nuisance, but effected a permanent injury to the value thereof,

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it is not error to instruct the jury, in estimating plaintiff's damage, any permanent depreciation in the value of his real estate occasioned by the nuisance might be considered. *Babb v. Curators of State University of Mo.*, 173.

9. INJUNCTION—DAMAGES—BOND—PLAINTIFF'S LIABILITY.—On the dissolution of a temporary injunction, damages sustained by reason of the granting thereof should be assessed against the plaintiff, and this, too, notwithstanding the plaintiff did not sign the bond made and accepted under the statutes at the time of the granting such injunction. *Teasdale v. Jones*, 243.

10. ——— ,WHAT DAMAGES ARE ASSESSABLE.—On motion to assess damages on dissolution, only such damages are assessable as resulted from the issuing of the temporary injunction and to the dissolution thereof; and costs and expenses thereafter, though on appeal, have no place in the judgment on such motion. *Ib.*

11. ——— REVIEWING FINDING OF DAMAGES.—Although an award by the jury in an action for personal injuries may seem large, it cannot be interfered with by an appellate court, unless it is so large as plainly to show passion, prejudice or a disregard of the evidence by the jury. And *held* that interference was not warranted in this case, the verdict therein being for twenty-two hundred and fifty dollars for injuries to the right hand of the plaintiff. *Honeycutt v. St. Louis, I. M. & S. Ry. Co.*, 674.

DEBTOR AND CREDITOR. See FRAUDULENT CONVEYANCES, 2, 3.

1. GARNISHMENT.—The sale of property at a fixed valuation which is to be applied towards the payment of the indebtedness of the vendor, the time and manner of such application being left to the discretion of the vendee, does not constitute an enforceable appropriation towards specific indebtedness, and the vendee is accordingly answerable as garnishee of the vendor for so much of the purchase money as he has not, prior to the garnishment, either actually paid, or bound himself to pay, on particular indebtedness of the vendor; nor is an application of such purchase money towards such indebtedness any defense to the garnishment, if it was made after the garnishment. *Keithley v. Pitman*, 596.

2. EVIDENCE.—Parol evidence is not admissible as between a debtor and an attaching creditor to show that an absolute bill of sale, given by the former to a third person for personal property levied upon, was in fact given as security for indebtedness to such third person. *State to use v. Koch*, 685.

DEED. See CONSTRUCTION, 3.

1. RULE AS TO DELIVERY OF.—The delivery of a deed is complete, when the grantor or obligor has parted with his dominion over

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it, with the intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent. *Ells v. Mo. Pac. Ry. Co.*, 165.

2. CONSTRUCTION—SPECIAL WORDS V. GENERAL WORDS—RULE. When a deed first speaks in general words, and afterwards in special words, and the latter accord with the former, this deed shall operate according to the special words, whether they enlarge or restrain the general words that precede; and where, as in this case, a deed for a right of way described the grant as a hundred feet in width through, etc., a certain tract, including a dwelling house, and subsequent special words described it as fifty feet on the north, and fifty feet on the south, side of the center of the track of the railroad of the grantee, as the same may be finally located and constructed over said tract, etc., the special words authorize the appropriation of any other strip of the grantor's land upon which the grantee might finally change the location of its line. *Ib.*

DEFENSE. See GARNISHMENT, 1.

1. STOLEN GOODS—OBJECT OF PURCHASER OF, NO DEFENSE—INSTRUCTION.—The fact that the purchaser of a stolen machine, who was an agent for the sale of the machine in a given territory, made the purchase with the view of convincing his principal that his territory was being invaded, constitutes no defense to an action against the vendor for the return of the purchase price, and an instruction to that effect is erroneous. *Porth v. Lux*, 162.

2. ACTION AT LAW.—This is not an equitable proceeding, but properly an action at law, and the answer contained but one defense, partiality of the appraisers. *Leitch v. Miller*, 180.

3. CONTRACTS—INDEPENDENT AGREEMENTS.—The mutual contracts of two contracting parties are independent, and a breach by one of the parties of an agreement to be performed by him is no defense to an action, instituted by him against the other party for a breach of the agreement on the part of the latter, if the agreements of the several parties thus broken were to have been performed at different times, and if the agreement violated by the party suing goes only to a part of the consideration for that violated by the party sued, and compensation for the violation of it can be made in damages. *Sawyer v. Christian*, 295.

4. NO RETURN OF WORTHLESS MACHINE.—That a machine was of no value for the purpose for which it was purchased is a valid defense as showing a failure of consideration and this whether the defendant offered to return the machine or not, or failed to notify plaintiff of its worthlessness. But where the article bought is of any value for any other purpose, then the vendee cannot retain it and interpose the defense of total failure of consideration. *Keystone Implement Co. v. Leonard*, 477.

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5. PROTECTION IN SALE OF GOODS—CASE ADJUDGED.—Plaintiff sued for balance of account for sale of certain proprietary medicines. The defense was that plaintiff had agreed to protect the defendant in the sale of the goods, and, after he had been indicted for selling liquor in four cases, had told him to get a lawyer and fight the cases. After this defendant compromised the cases by pleading guilty to one indictment and being fined forty dollars and paying the costs in the others. *Held*, that the evidence did not sustain the defense; the condition to the plaintiff's liability to defendant was that he employ a lawyer and fight the cases; and defendant could not put a liability upon the plaintiff outside of the agreement. *Donnell Mfg. Co. v. Hart*, 512.

6. NEGATIVE AVERMENT.—The statute declaring that if a tenant for life shall commit waste "without special license in writing so to do, he shall be subject to civil action," etc., does not impose upon plaintiff the burden of proving that defendant had not the special license, but is matter of defense which must be established by the defendant. *Davis v. Clark*, 515.

DEFINITIONS.

NUISANCE.—A nuisance, in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property, which violates the rights of another, is in an essential degree a nuisance. *George v. Wabash Western Ry. Co.*, 433.

DELIVERY. See SALES, 1, 2.

DEED—RULE AS TO DELIVERY OF.—The delivery of a deed is complete, when the grantor or obligor has parted with his dominion over it, with the intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent. *Ells v. Mo. Pac. Ry. Co.*, 165.

DEPOSITIONS.

THE DEPOSITION of one of several contracting parties, though in relation to the matter of contract, is not rendered incompetent as evidence by the death of another of the contracting parties after the taking of the deposition. *LaFayette Building Ass'n v. Kleinhoffer*, 388.

DESCRIPTION. See CONSTRUCTION, 3.

DOWER.

WILL—QUARANTINE.—When a widow elects to take an undivided share of her husband's estate under the provisions of his will, she will not be entitled to quarantine under Revised Statutes, 1879, sec. 2205. *In re Final Settlement of Tyler*, 378.

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DRAMSHOPS.

COUNTY COURTS—JURISDICTION—DRAMSHOP LICENSE.—A petition for a dramshop license need not, in order to confer jurisdiction on the county court, aver in the language of the statute that the petitioners compose a majority of the assessed taxpaying citizens, etc. If such jurisdictional facts are made to appear in other parts of the record, it is sufficient to give jurisdiction and render its action valid. (*Distinguishing State ex rel. v. Heege*, 37 Mo. App. 338.) *State ex rel. v. Cauthorn*, 94.

DRUGGISTS.

1. CRIMINAL LAW—SALE OF INTOXICATING LIQUOR.—Evidence that the defendant was a registered druggist, and that a merchant's license for drugs was issued to him, though such license did not contain the given name of the defendant, is sufficient evidence of the occupation of the defendant as druggist within the purview of section 2 of the act of March 29, 1883, concerning the sale of intoxicating liquors by druggists, and the statute of which it is amendatory. *State v. Quinn*, 627.

2. THE SAME.—A sale of whiskey at the drugstore of defendant by a person, then in charge of such store and attending to the defendant's business, *prima facie*, establishes a sale by the defendant within the meaning of said section 2. *Ib.*

EJECTMENT.

ASSESSMENT OF VALUE OF IMPROVEMENTS—NOTICE OF PROCEEDINGS TO PLAINTIFF IN EJECTMENT.—If a plaintiff recover judgment in an action of ejectment, and the defendant, after the term of court at which the judgment was rendered, proceeds under the statute (R. S. 1879, sec. 2259) to recover compensation for improvements made by him in good faith on the land sued for, notice of this proceeding must be given to the plaintiff in the action; but, if the plaintiff is a non-resident, the plaintiff may be brought into court by publication for the purpose of such proceeding. *Koch v. Hawkins*, 680.

ELECTIONS. See LOCAL OPTION.

EMBLEMENTS.

1. AS BETWEEN MORTGAGOR AND MORTGAGEE.—Annual crops planted on mortgaged lands by the mortgagor, or by one claiming under him, and remaining unsevered at the time of the foreclosure of the mortgage, but subsequently severed by the mortgagor while still in the possession of the lands, pass to the purchaser at the foreclosure sale as against the claims of the mortgagor, or of such claimant under him, provided that they were sown after the condition broken; *sed aliter*, if such crops were planted before condition broken. *Hayden v. Burkemper*, 346.

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Per Thompson, J., dissenting:

3. ———. Such crops remain the property of the mortgagor, or of such claimant under him, whether sown before or after condition broken. *Ib.*

EQUITY.

CONVERSION—REMEDY.—When a court of equity has established the right to redeem, but the mortgagee has consumed or disposed of the property, so that it cannot be redeemed in kind, it may enter a personal decree against the mortgagee for the excess of the value of the property over the amount found due on the mortgage. *Moore v. Thompson*, 195.

ESTOPPEL. See EVIDENCE, 15; FORMER RECOVERY, 1; JUDGMENT, 6.

1. WHEN THE OWNER of property, levied upon under a writ of attachment against a third person, is in the possession thereof at the time of the levy, and furthermore verbally notifies the attaching officer of his title, neither his giving a forthcoming bond and afterwards surrendering the property upon the order of the court issuing the writ, nor his failure to make a claim in writing for the property, will stop him from claiming the property after such surrender. *Huels v. Boettger*, 310.

2. MARRIED WOMEN.—The fact, that a promise made by a married woman has been acted upon by the promisee, does not estop the married woman from denying the validity of the promise on the ground of her inability to contract. *Saulsbury v. Corwin*, 373.

EVIDENCE.

1. JUDGMENT—COMPETENCY.—A judgment obtained by such administrator against such distributee is not competent evidence of the existence of the indebtedness sued on as against a prior assignee of such distributee, *Ford v. O'Donnell*, 51.

2. THE SAME.—Nor is such judgment rendered competent evidence of such indebtedness against such assignee by reason of the fact that, prior to the rendition thereof, the administrator of the estate notified such assignee of the pendency of the suit in which the judgment was recovered, and in such notice also accorded to such assignee the right to appear in, and defend against, said suit. *Ib.*

3. PLEADING—MITIGATION OF DAMAGES.—In actions for personal injuries evidence in mitigation of damages is admissible under a general denial. *Beck v. Dowell*, 71.

4. DAMAGES—PLAINTIFF'S PECUNIARY CONDITION.—When a case warrants exemplary damages, evidence of the pecuniary condition of the plaintiff, and of the plaintiff's family, is admissible; and the admission thereof is not error, if the evidence in the cause at the time would have authorized the assessment of such damages by the jury. *Ib.*

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5. PRACTICE, APPELLATE—NON-PREJUDICIAL ERROR.—The admission by the trial court of evidence establishing merely a state of fact, which the law would have presumed in the absence of evidence, *held* not prejudicial. *Ib.*

6. RES GESTÆ—Evidence of the acts of a person who was not a party to the suit *held* admissible as part of the *res gestæ*. *Ib.*

7. FRAUDULENT CONVEYANCES—DECLARATIONS OF AGENT—INDEBTEDNESS OF GRANTOR—GOODS PURCHASED OF PLAINTIFF.—On the trial of an interplea in an attachment suit in which the sale by defendant to the interpleader is attacked for fraud, it is proper to ask, on cross-examination, the husband and agent of the interpleader, what he had said about this not being the first sale he had had attacked as a "humbug sale;" and to admit judgments of other creditors against the defendant, and to show that a portion of the goods transferred to interpleader was sold defendant by the creditors in attachment suits. *Meyberg v. Jacobs*, 128.

8. REPORT OF SALE—HEARSAY.—An account of sales rendered by plaintiff's commission merchant, containing the prices obtained and the weight of cattle sold, is hearsay and incompetent evidence. *Hess v. Mo. Pac. Ry. Co.*, 202.

9. CARLOAD—CUSTOMARY.—In an action for damages for breach of contract to deliver so many carloads of wheat it is not error to admit evidence of what is customary to consider a carload of wheat. *Price v. Vanstone*, 207.

10. CONTRACT PRICE AND PRICE AT DELIVERY.—In such action it is proper to admit evidence of the difference between the contract price and the price of wheat on the day and at the place it was agreed to be delivered. *Ib.*

11. ARCHITECT'S CERTIFICATE AND EVIDENCE.—Though the contract makes the architect's certificate conclusive, in the absence of such certificate, his testimony will not be conclusive, but will be received on the same terms with any other witness of equal knowledge and opportunity. *Boteler v. Roy*, 234.

12. JUDICIAL NOTICE.—The court knows judicially that the abbreviation "Supt." stands for the word superintendent, and that a superintendent is a managing officer. *South Mo. Land Co. v. Jeffries*, 360.

13. IN AID OF CONSTRUCTION OF WRITTEN CONTRACT.—When the meaning of a contract in writing is doubtful, resort may be had to the circumstances under which it was given, to ascertain the same. *LaFayette Building Ass'n v. Kleinhoffer*, 388.

14. WARRANTY—EXPERT WITNESS—LAPSE OF TIME.—Where expert witnesses testify that tobacco of good quality did not deteriorate

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by age but generally grew better, it is not error to permit them to testify as to the consideration of said tobacco on an examination made more than a year after the sale in question. *Werner v. O'Brien*, 483.

15. PLEADING—ESTOPPEL—INSTRUCTION.—On an examination of the pleading and evidence it is *held* that neither plaintiff's replication nor his evidence were sufficient to support an instruction embodying an estoppel. *Ib.*

16. THREATS.—When the question is whether a person has done a particular thing and some evidence of it has been given. it is surely competent to show in corroboration that he had avowed his purpose beforehand. *Davis v. Clark*, 515.

17. EXPERT TESTIMONY.—The opinion of a witness to a matter in issue is not competent evidence, if the subject be not one which is beyond the knowledge or experience of ordinary men. *Walton v. K. C., Ft. S. & M. Ry. Co.*, 544.

18. EVIDENCE considered and *held* insufficient to sustain the verdict. *State v. Quinn*, 573.

19. DEBTOR AND CREDITOR.—Parol evidence is not admissible as between a debtor and an attaching creditor to show that an absolute bill of sale, given by the former to a third person for personal property levied upon, was in fact given as security for indebtedness to such third person. *State to use v. Koch*, 635.

20. FRAUDULENT CONVEYANCES—EVIDENCE OF THE VENDOR'S INSOLVENCY.—In the trial of an issue, whether a sale of property in dispute was fraudulent as to the creditors of the vendor, evidence of the insolvency of the vendor more than a year after the sale is irrelevant. *Martin v. Fox*, 664.

EXCEPTIONS.

1. PRACTICE, TRIAL—SAVING EXCEPTIONS.—*Semble*, that the mere failure of a party to expressly save an exception to an adverse ruling should not debar such party from assigning error of such ruling, an exception should be presumed. *Beck v. Dowell*, 71.

2. APPELLATE PRACTICE—EQUITY V. LAW—OBJECTION.—The objection, that the issues in this case were of equitable cognizance, comes too late in the appellate court, as plaintiff submitted without objection to the manner of the trial below. *Leitch v. Miller*, 183.

3. PRESERVING EXCEPTIONS.—When improper remarks in the argument of counsel to the jury are matter of exception, they should be preserved by the bill of exceptions, and not brought to the attention of the trial court by affidavits filed in support of the motion for trial. *Norton v. St. Louis & H. Ry. Co.*, 642.

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4. PRACTICE, TRIAL—PRESERVATION OF EXCEPTIONS BY MOTION FOR NEW TRIAL.—Exceptions taken to the refusal of the trial court to check improper remarks of counsel to the jury, upon due objections thereto, are lost, if objection be not renewed by motion for new trial. *Honeycutt v. St. Louis, I. M. & S. Ry. Co.*, 674.

EXECUTION.

1. COSTS—RIGHT OF PARTIES TO ENTER SATISFACTION.—The costs taxed in a cause belong to the persons to whom they are payable, when collected; and a fee bill or execution may issue for unpaid costs due to officers of the court, notwithstanding an acknowledgment of satisfaction of the judgment by the party in whose favor it was rendered. *State ex rel. v. Ashbrook*, 64.

2. PROPERTY SEIZED UNDER—CLAIMED BY ANOTHER.—When the rights of a licensee to enter, sever and cut growing trees are interfered with by means of an execution, his remedy for such wrong cannot be pursued under the provision of sections 2366, *et seq.*, Revised Statutes, 1879. *Potter v. Everett*, 152.

3. LICENSE—PERSONAL TRUST NOT VENDIBLE.—A license to enter upon another's land and sever and remove standing trees therefrom is in its nature a personal trust, and not the subject of a levy and sale under execution. *Ib.*

4. PRACTICE, TRIAL—PLEADING—CLAIM FOR PROPERTY LEVIED UPON. When property levied upon under an execution is claimed by a third person, and an indemnifying bond is given by the execution plaintiff, which is returned to court, as provided by Revised Statutes, 1879, section 2367, and proceedings are then had in the circuit court, as provided by said section, the law contemplates that there shall be written pleadings, as in civil actions. *Martin v. Fox*, 664.

5. THE SAME.—An answer filed by the execution plaintiff, merely denying that the claimant "is in good faith the lawful owner of the whole property," so levied upon and claimed, is insufficient to raise the issue that a sale of the execution debtor to the claimant under which the claimant derived title to the property, was fraudulent as to the creditors of the debtor. *Ib.*

6. THE SAME.—If the execution plaintiff in such case seeks to hold the property on the ground that his judgment is for the purchase money thereof, and that the claimant is not a *bona fide* purchaser without notice, he should plead such claim. *Ib.*

EXEMPTIONS.

FRAUDULENT CONVEYANCES.—If personal property be sold to defraud creditors of the vendor and be thereafter levied upon by such creditors, the vendor is not entitled to claim the same as exempt,

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if it was not of a kind specifically exempted by statute, and if it is not affirmatively shown that it constituted all the property owned by the debtor at the time of sale, and that it was exempt because less than three hundred dollars in value. *State to use v. Koch*, 635.

EXPERT. See DAMAGES, 7; EVIDENCE, 15, 17.

FEE BILL. See CRIMINAL LAW, 14; MANDAMUS, 1.

FORCIBLE ENTRY AND DETAINER. See LANDLORD AND TENANT, 1.

1. AMENDMENT.—The circuit court, on appeal from the judgment of a justice of the peace in an action of unlawful detainer, may allow an amendment of the complaint, increasing the claim for damages. *Lucas v. Fallon*, 551.

2. NEW BOND.—Circumstances considered, and an order in the circuit court requiring additional bond *held* erroneous in requiring such bond for an excessive amount. *Ib.*

FORMER RECOVERY.

BAR.—Although two promissory notes are given in one transaction by a common maker to a common payee, they constitute independent causes of action, and the recovery of judgment upon one of them in a suit brought by the payee against the maker after the maturity of both will not debar a recovery on the other. *Williams v. Kitchen*, 604.

FRAUDS AND PERJURIES.

1. ORIGINAL PROMISE—COLLATERAL PROMISE.—In order to hold one for the price of goods delivered to another, in the absence of a writing, it is not only necessary to show a promise on his part, but it is requisite to show that the credit was given solely to the party making the promise; and if the party receiving the goods, or for whose benefit the promise was made, be himself liable at all (except it be a joint promise), the case falls within the statute of frauds. The promise in this case *held* under the evidence not original. *Price v. Chicago, M. & St. P. Ry. Co.*, 189.

2. LANDLORD AND TENANT—VERBAL LEASE—UNLAWFUL DETAINER. A verbal lease of land entered into, August, 1888, by which the term was to begin in March, 1889, and end March 1, 1890, is within the prohibitions of the statute of frauds, and is no bar to an action of unlawful detainer. *Beiler v. Devoll*, 251.

FRAUDULENT CONVEYANCES.

1. EVIDENCE—DECLARATIONS OF AGENT—INDEBTEDNESS OF GRANTOR—GOODS PURCHASED OF PLAINTIFF.—On the trial of an interplea in an attachment suit in which the sale by defendant to the interpleader is attacked for fraud, it is proper to ask, on cross-examination, the husband and agent of the interpleader, what

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he had said about this not being the first sale he had had attacked as a "humbug sale;" and to admit judgments of other creditors against the defendant, and to show that a portion of the goods transferred to interpleader were sold defendant by the creditors in attachment suits. *Meyberg v. Jacobs*, 128.

2. CREDITOR SECURING DEBT—MUST STOP AT THAT.—If a *bona fide* creditor do more than obtain his debt, and thereby put it in the power of his debtor to hinder, delay or defraud other creditors, and does it for that purpose, the act in going beyond what he legitimately might do will taint and vitiate the whole transaction, as where he takes more goods than are necessary to pay his debt, and pays the difference in money to his debtor. *Ib.*

On rehearing.

3. AN INSTRUCTION to the effect that a creditor, in securing his own debt, cannot do so with a view of aiding the debtor to hinder, etc., his creditors approved. *Ib.*

4. ATTACHMENT—VOLUNTARY CONVEYANCE—INTENT.—A voluntary conveyance of the husband to the wife made at a time when he was indebted beyond his ability to pay, the effect of which conveyance is to hinder and delay the creditors of the husband, is fraudulent and void as to such creditors and furnishes ground for attachment, and the motives of husband in making such conveyance are wholly immaterial. *Cooper v. Standley*, 138.

5. DELIVERY OF GOODS SOLD.—If the acts of a purchaser of a stock of merchandise in taking and keeping possession of the property sold are open, notorious and visible, and such as to clearly and unequivocally indicate a complete delivery, his failure to take all the means having a tendency to impart notice of the sale will not invalidate the sale as to the creditors of the vendor. And *held*, in the case at bar, that a sale was not invalid as to the vendor's creditors, because the vendee failed to remove a curtain having the vendor's name on it, when his acts were otherwise sufficient to constitute an open and notorious change of possession. *Huels v. Boettger*, 310.

6. EXEMPTIONS.—If personal property be sold to defraud creditors of the vendor and be thereafter levied upon by such creditors, the vendor is not entitled to claim the same as exempt, if it was not of a kind specifically exempted by statute, and if it is not affirmatively shown that it constituted all the property owned by the debtor at the time of sale, and that it was exempt because less than three hundred dollars in value. *State to use v. Koch*, 635.

7. EVIDENCE OF THE VENDOR'S INSOLVENCY.—In the trial of an issue, whether a sale of property in dispute was fraudulent as to the creditors of the vendor, evidence of the insolvency of the vendor more than a year after the sale is irrelevant. *Martin v. Fox*, 664.

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8. PRESUMPTIONS—BURDEN OF PROOF.—Evidence of the possession of the property by a claimant of it is *prima facie* evidence of his ownership of it; and in the trial of an issue, whether the sale of that property to such claimant was fraudulent as against the creditors of the vendor, who attack the *bona fides* of the transaction, such creditors have the burden of showing the sale to have been fraudulent. *Ib.*

9. ———. The fact that the vendor of property is insolvent, and that the vendee is closely related to him, does not raise any legal presumption of fraud. These are mere circumstances to be considered by the trier of the facts in the determination of the good faith of the transaction as to creditors of the vendor. *Ib.*

GARNISHMENT.

DEBTOR AND CREDITOR.—The sale of property at a fixed valuation, which is to be applied towards the payment of the indebtedness of the vendor, the time and manner of such application being left to the discretion of the vendee, does not constitute an enforceable appropriation towards specific indebtedness, and the vendee is accordingly answerable as garnishee of the vendor for so much of the purchase money as he has not, prior to the garnishment, either actually paid, or bound himself to pay, on particular indebtedness of the vendor, nor is an application of such purchase money towards such indebtedness any defense to the garnishment if it was made after the garnishment.

GIFT.

DONATIO CAUSA MORTIS.—A gift made by a decedent in contemplation of, and immediately prior to, his death, and consummated by delivery, is valid. *Nelson v. Sudiek*, 341.

GOVERNOR.

CIRCUIT CLERK—AUTHORITY OF GOVERNOR TO FILL VACANCY.—Such resignation causes a vacancy in the clerkship which the governor has the right to fill by appointment, notwithstanding that the circuit court has previously appointed a temporary clerk, who holds the office at the time of the appointment by the governor. *State ex rel. v. Blakemore*, 406.

GROWING TIMBER.

GROWING TREES—REALTY—LICENSE TO ENTER AND REMOVE.—Whatever may be the law elsewhere, growing trees, standing on land, are, in this state, a part of the realty, and must so remain until severed therefrom, and the title to them while so standing can be passed and acquired only by a statutory deed; and an intention on the part of the licenser and the licensee, evinced by contract, that the latter shall, within a reasonable time, enter, sever and remove such growing trees, does not have the effect to convert the same into personal property, until the license is exercised and this, though the license within certain limits be irrevocable. *Potter v. Everett*, 152.

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GUARANTY.

SINGLE OR CONTINUOUS DEALING—RULE OF CONSTRUCTION.—When it is doubtful from the language contained in the contract whether the guaranty was for a single dealing or for a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if in fact he did accept it; so where M., a tenant of defendant, placed orders for goods to the amount of thirteen to seventeen hundred dollars with plaintiffs, wholesale merchants, who thereupon told defendant, if he would guarantee the payment of thirteen hundred dollars, they would fill the orders and take their chances on the excess; and plaintiffs then executed this writing: "I hereby guarantee the payment of bills as they mature purchased by M. of R. P. Smith & Sons * * * to the amount of thirteen hundred dollars," *held* said writing was not intended to be a continuing guaranty. *Smith v. Van Wyck*, 522.

GUARDIAN AND WARD.

1. TENANTS IN COMMON—ACCOUNTABILITY.—When one of several cotenants, who occupies the whole of the realty held in common, holds a position of trust towards one of his cotenants, as if he be guardian of the person and estate of such cotenant, he is accountable to such cotenant for the latter's share of the reasonable rental value of the realty during such occupancy; the liability resting on his obligation to make his ward's property productive. *In re Final Settlement of Tyler*, 378.

2. PENAL INTEREST.—When a guardian fails to charge herself with the share of the ward of the rental value of realty owned in common by the guardian and ward, but occupied exclusively by the guardian, and where the guardian in so doing does not act out of bad faith, the guardian should not be charged by way of punishment with the highest interest, compounded; interest, in such case, should only be allowed so far as requisite to compensate the ward for the loss suffered. *Ib.*

HUSBAND AND WIFE.

1. ATTACHMENT—LAND BOUGHT WITH WIFE'S MONEY.—If the husband purchases land with money belonging to his wife, and holds the same for and in her behalf, then he might lawfully convey said land to her, and such transaction would not furnish grounds for attachment. *Cooper v. Standley*, 188.

2. WIFE'S SEPARATE ESTATE—CONSIDERATION.—Where a wife in Illinois received money from her father's estate, which her husband then spent in improving his own real estate, and, upon his selling the same, the wife refused to join in the deed except upon

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receiving her money back, which was accordingly paid her, and which she took and claimed as her separate means; and, upon removing to Missouri, the husband used the same in purchasing real estate and took the title thereto in himself, *held*, these facts constituted the money the separate property of the wife and furnished a good consideration for a conveyance from the husband to the wife. *Ib.*

3. CHATTELS OF WIFE AT COMMON LAW—STATUTORY SEPARATE PROPERTY.—In the absence of proof the Missouri courts will presume the common law in force in Illinois. While at common law the chattels of the wife vested in the husband by virtue of the marriage yet he could waive his rights thereto and permit her to retain them released from the husband's marital rights. And where, as in this case, the wife's money was set aside to her in Illinois, it became her separate means, and as such she brought it to this state where it was impressed with the provisions of our laws and was her statutory separate property, of which her husband could not deprive her, without her assent in writing. *Ib.*

4. CRIMINAL LAW — ABANDONMENT OF WIFE—INFORMATION. — An information, charging an abandonment of the wife and a failure to provide for her, is sufficient, if it charges the offense in the language of the statute. (R. S. 1879, sec. 1278.) *State v. Brinkman*, 284.

INDICTMENT. See CRIMINAL LAW, 4.

1. CRIMINAL LAW—INDICTMENT FOR SELLING INTOXICATING LIQUORS. An indictment, which charges the defendant with having made several sales of intoxicating liquors at the same time, charges but one offense. *State v. Atkins*, 344.

2. ———. The statement of the offense in the indictment in such case is sufficient, if it follows the language of the statute. *Ib.*

INFANCY.

DISAFFIRMANCE OF CONTRACT.—An infant who purchases a chattel, and, to secure the payment of the purchase money, gives a mortgage on such chattel and other personal property of his own, may, if the vendor under the mortgage takes possession of the chattel sold and is thus placed *in statu quo*, disaffirm the mortgage, and thus release the additional property covered by it; and an action of replevin for such additional property, instituted by him, but dismissed without being prosecuted to a final judgment, is a sufficient disaffirmance. *Stotts v. Leonhard*, 336.

INFORMATION. See CRIMINAL LAW, 1; HUSBAND AND WIFE, 4.

1. CRIMINAL LAW—DISTURBING WORSHIP.—An information for the disturbance of a religious meeting is sufficiently definite, if it charges the offense in the terms of the statute. *State v. McDaniel*, 356.

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2. ———. An information must be based either upon the personal knowledge of the prosecuting attorney, or upon that of some private person, who lodges with the prosecuting attorney a complaint setting forth the facts, and verifies the same by his affidavit. *State v. Hatfield*, 358.

INJUNCTION.

1. DAMAGES—BOND—PLAINTIFF'S LIABILITY.—On the dissolution of a temporary injunction, damages sustained by reason of the granting thereof should be assessed against the plaintiff, and this, too, notwithstanding the plaintiff did not sign the bond made and accepted under the statutes at the time of the granting such injunction. *Teasdale v. Jones*, 243.

2. WHAT DAMAGES ARE ASSESSABLE.—On motion to assess damages on dissolution, only such damages are assessable as resulted from the issuing of the temporary injunction and to the dissolution thereof; and costs and expenses thereafter, though on appeal, have no place in the judgment on such motion. *Ib.*

3. CLOUD ON TITLE—SUFFICIENCY OF PETITION.—Where a petition, as in this case, shows that defendant had of record an apparent right to sell the plaintiff's land and make a title thereto superior to the plaintiff's, but that in the light of the facts outside the record, and which rest in parol, and can only be shown by extrinsic testimony, the defendant has no such right, such petition shows that plaintiff is entitled to equitable relief and an injunction. *Bank of Tipton v. Davidson*, 421.

4. SALE UNDER VOID JUDGMENT.—The sale of the land under such void judgment may be restrained by injunction at the instance of those succeeding to the title. *Clifton v. Anderson*, 616.

INSTRUCTIONS. See DEFENSE, 1; STOLEN GOODS, 1.

1. POSSESSION—INDEFINITE DESCRIPTION—INTENTION OF GRANTOR. In a contest between two grantees of the same grantor, where the older conveyance was indefinite in its description of the premises intended to be conveyed, it is not *error* to admit parol evidence as to the intention of the grantor to convey to the older grantee the land claimed to be embraced in the conveyance to the subsequent grantee, and to instruct the jury that if the grantors in the former conveyance intended and understood they were conveying the premises in dispute to the grantees therein, and that said grantees, believing said deed, conveyed said premises to them, and, under and by virtue thereof, took possession of said premises, and have ever since that time—more than ten years—held possession thereof, and now have possession of the same, then said former grantees are entitled to recover, etc. *Thornton v. Mo. Pac. Ry. Co.*, 265.

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2. PLEADING—ISSUES.—An instruction that hypothecates the facts not averred in the pleadings, or enlarges the issues, or which speaks of the acts of the servants of "said railway" without reference to what corporation was meant, or that confuses and misleads the jury as to issues it was to try, is fatally erroneous. *George v. Wabash Western Ry. Co.*, 438.

3. ASSUMPTION OF FACT.—The court's instruction in this case *held* not to contain the vice of assuming a material fact in the issue. *Werner v. O'Brien*, 483.

4. PRACTICE, TRIAL—UNWARRANTED NUMBER OF INSTRUCTIONS. When the number of instructions asked by a party is unwarrantably large, as where twenty-five are asked by a party in a cause in which the issues are simple and few, the trial court is justified in refusing all the instructions asked. *Norton v. St. Louis & H. Ry. Co.*, 642.

5. INSTRUCTIONS NOT SUPPORTED BY EVIDENCE.—An instruction to the jury must be based on evidence and not on conjecture; otherwise it is erroneous. *Ib.*

6. ASSUMPTION OF FACTS—NON-PREJUDICIAL ERROR.—*Held* that the assumption of matters of fact in instructions in this case was no ground for the reversal of the judgment, because these matters were affirmatively established by the evidence of the appellant. *Dimmitt v. Hannibal & St. J. Ry. Co.*, 654.

INSURANCE.

1. LIMITATION ON PROOF OF LOSS AND COMMENCEMENT OF SUIT.—A provision of an insurance policy, requiring suit to be brought within six months next after the loss or damage shall occur, means six months from the date of the loss, and not from the ascertainment of the amount thereof; and this, too, notwithstanding said policy contained a provision that proof of loss should be made in sixty days after the loss. *Grigsby v. German Ins. Co.*, 276.

2. FAILURE TO DISCLOSE TITLE.—Where the policy of insurance requires a disclosure of the title to the property insured, if the assured does not disclose his title or discloses a false one, he cannot maintain an action on the policy. *Ib.*

3. EXAMINATION UNDER OATH AND SUBSCRIPTION THERETO.—Where the assured submits to an examination under oath as required by the terms of the policy, he has a reasonable time in which to consult with his attorney before signing the same, but this will not avail plaintiff as an excuse for failing to make proof of loss within the specified time, where, as in this case, half of the time limited remained and the assured did not consult his attorney during the currency of such time. *Ib.*

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4. WAIVER—ESTOPPEL.—There should be something in the conduct of the insurer in the nature of an estoppel in order to constitute a waiver of a condition in an insurance policy. *Ib.*

INTERPLEA.

BURDEN OF PROOF—SALE ADMITTED—FRAUD PLEADED—HARMLESS ERROR.—Where plaintiff's answer to an interplea in an attachment suit admits the sale and transfer of possession to the interpleader, but pleads fraud in avoidance thereof, the burden of proof is on the plaintiff to show the fraud, but a direction of the court to the parties before the testimony began, that the burden was on the interpleader to show *prima facie* the ownership of the goods attached, is, under the circumstances of this case, harmless error. *Meyberg v. Jacobs*, 128.

JUDGMENT. See COSTS, 1; EXECUTION, 1.

1. COMPETENCY, AS EVIDENCE.—A judgment obtained by such administrator against such distributee is not competent evidence of the existence of the indebtedness sued on as against a prior assignee of such distributee. *Ford v. O'Donnell*, 51.

2. THE SAME.—Nor is such judgment rendered competent evidence of such indebtedness against such assignee by reason of the fact that, prior to the rendition thereof, the administrator of the estate notified such assignee of the pendency of the suit in which the judgment was recovered, and in such notice also accorded to such assignee the right to appear in, and defend against, such suit. *Ib.*

3. RES ADJUDICATA.—When several persons acquire realty as tenants in common under a will, and one of the tenants in common is both executrix of the will, and guardian of the person and estate of one of her cotenants, a final settlement made by her as such executrix, in which she does not charge herself with the rental value of the realty during her occupancy thereof, is not *res adjudicata* as to a claim of her ward for a share of such rental value, for which she is liable in her capacity as guardian owing to her obligation, as such, to render her ward's estate productive. *In re Final Settlement of Tyler*, 378.

4. THE SAME.—Neither will the judgment in a suit for the partition of the realty, in which no claim for such rental value was made, debar the ward from claiming her share of such rental value from her guardian, though she and her guardian were parties to the suit, and she was of age at the time of the partition. *Ib.*

5. OPENING ROAD.—In the determination of a petition for a public road, the county court does not act in a judicial capacity, and the refusal of such petition is not a judgment and no appeal will lie therefrom. *Aldridge v. Spears*, 527.

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6. PRINCIPAL AND AGENT.—The estoppel of a judgment binds not only the parties to it, but also their privies. And where an alleged chattel mortgage stands in the name of an agent of its real owner, and proceedings for its enforcement by an action of replevin for property which it purports to convey are taken by and in the name of such agent, an adjudication against the claims thus advanced is binding upon the principal, and may be invoked as *res adjudicata* against such principal by persons to whom such property was subsequently transferred by the defendant in such action in replevin. *Lippman v. Campbell*, 564.

7. IF ONLY HER ADMINISTRATOR is made a party defendant, the judgment will be void, and though the person acting and made a party as administrator succeed as an individual to a portion of the married woman's title, as if he be tenant by the curtesy, such interest as an individual will not be bound by the judgment. *Clifton v. Anderson*, 616.

JUDICIAL NOTICE.

THE COURT knows judicially that the abbreviation "Supt." stands for the word superintendent, and that a superintendent is a managing officer. *South Mo. Land Co. v. Jeffries*, 360.

JURISDICTION. See COUNTY COURTS, 2; DRAMSHOPS, 1.

1. APPELLATE—AMOUNT IN CONTROVERSY.—The supreme court has jurisdiction of an appeal taken by a plaintiff from a judgment for the defendant in an action for personal injuries in which the damages are laid in a sum exceeding twenty-five hundred dollars, and there is nothing in the record debarring the plaintiff, if he has a cause of action, from recovering more than said sum. *Willi v. Lucas*, 70.

2. ATTACHMENT—AFFIDAVIT FOR—AMENDMENT.—An affidavit for attachment, filed in the cause, though in proper form otherwise, which is not signed by the alleged affiant, and the *jurat* is neither signed by the clerk nor attested by the seal of the court, is a nullity, and cannot be amended, and confers no jurisdiction to issue a writ of attachment. *Third Nat. Bank v. Garton*, 113.

On motion for rehearing.

3. THE SAME—APPEARANCE.—On motion for rehearing the majority of the court adhere to the original opinion and hold in addition that the fact of defendant's appearing and pleading to a subsequently filed affidavit does not waive the necessity of a proper affidavit in the inception of the attachment proceeding, which is a proceeding *in rem*, and the means provided by the statute must be pursued to bring into the jurisdiction of the court the *res*, the property of the defendant. *Ib.*

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Per Smith, P. J., dissenting:

4. THE SAME.—The failure of the affiant to sign the affidavit, and the want of a *jurat* thereto, were not such an insufficiency as prevented the court from acquiring jurisdiction, and there was no error in permitting the affidavit to be amended as provided by the statute; and the defendant's plea in abatement waived the defects in the affidavit. *Ib.*

5. APPELLATE.—When the question is doubtful or fairly debatable, whether the supreme court or this court has jurisdiction of an appeal, and the appeal is taken to this court, the cause will be transferred to the supreme court. *Held*, accordingly, that the case at bar, which was an action for the admeasurement of dower, should be thus transferred. *Null v. Howell*, 329.

6. JUSTICES OF THE PEACE.—In an action of replevin the averment in the statement filed by the plaintiff, of the value of the property sued for, and of the damages for its detention and for injuries to it, conclusively determines the jurisdiction of the justice, and a dismissal of such an action for want of jurisdiction is not warranted by the fact that the plaintiff, in open court, testified to a value in excess of the justice's jurisdiction. *Malone v. Hopkins*, 331.

7. APPEALS.—An action to rescind the sale and conveyance of land from the defendants to the plaintiffs on the ground of fraud, and to cancel a deed of trust and notes given for the purchase money by the plaintiffs to the defendants, especially if it is instituted after breach of the conditions of such deed of trust, involves title to land; and the supreme court alone has jurisdiction of an appeal in such cause. *Nearen v. Bakewell*, 625.

JURY.

PRACTICE, TRIAL—OBJECTION TO JURY ARRAY.—The objection that the prevailing party in an action was a member of the county court that selected the regular panel, from which the jury in the cause was drawn in the trial, should be presented by challenge to the array before trial, and comes too late after the verdict, though the complaining party had no knowledge of the fact till after the verdict, unless it is known that substantial injustice had been done. *Boteler v. Roy*, 234.

JUSTICES' COURTS. See COSTS, 7, 8.

1. NOTICE OF APPEAL—ATTORNEY AND AGENT.—The service of notice of an appeal from a justice's court upon an attorney employed to try the case in the courts of the county by the appellee, a non-resident of the county, is sufficient compliance with the statute. The evidence in this case examined and the party served found to be the agent and attorney of the appellee. *Bensberg v. Turk*, 227.

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2. JURISDICTION.—In an action of replevin the averment in the statement filed by the plaintiff, of the value of the property sued for, and of the damages for its detention and for injuries to it, conclusively determines the jurisdiction of the justice, and a dismissal of such an action for want of jurisdiction is not warranted by the fact that the plaintiff, in open court, testified to a value in excess of the justice's jurisdiction. *Malone v. Hopkins*, 331.

3. REPLEVIN.—In an action of replevin (instituted in the case at bar before a justice of the peace) the bond requisite to an order of delivery need not be executed by or in the name of the plaintiff, but may be given on behalf of the plaintiff by and in the name of a third person as principal. *South Mo. Land Co. v. Jeffries*, 360.

4. THE SAME.—If, in an action of replevin, instituted before a justice of the peace, the bond given to procure an order of delivery is invalid, that is not ground for the dismissal of the action; but *semble*, that the circuit court might, on an appeal of the cause, require new bond. *Ib.*

5. THE SAME—AMENDMENT.—If the statement and affidavit filed before the justice in such action be not nullities, they may be amended in the circuit court on such appeal. *Ib.*

6. REPLEVIN—APPEAL.—If an appeal be taken in an action of replevin from a justice of the peace to the circuit court by the party who holds the possession of the property sued for the appellant has not the right to dismiss his appeal in the circuit court. *Munley v. King*, 531.

7. THE SAME.—If the appellant in such case fail to prosecute his appeal, and the judgment of the justice is informal in that it fails to determine the value of the property the circuit court is not bound to affirm that judgement, but should, after hearing evidence, find the value of the property and render judgment *de novo* in the alternative form prescribed by the statute. *Ib.*

8. THE SAME.—In an action in which the value so found by the circuit court exceeded the penalty of the bond of the appellant, *held* that the appellee should have the option between a judgment against the appellant alone for the property or its ascertained value, and a judgment against the appellant and his surety for the property or a sum not exceeding the penalty of the bond. *Ib.*

9. THE SAME.—In an action instituted before a justice of the peace and appealed to the circuit court, the entries on the justice's docket determine who are the parties plaintiff or defendant; but *semble*, that in an action in which the justice's docket entries named "A., agent of B.," as the plaintiff, while the statement of

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the cause of action filed with the justice was based on a contract alleged to have been made by the defendant with B., such entries were open to explanation, showing that the cause of action tried before the justice was the claim of B. against the defendant, and that, on such showing, an amendment was permissible, continuing the cause in the name of B. alone. *Clements v. Greenwell*, 589.

LANDLORD AND TENANT.

1. VERBAL LEASE—STATUTE OF FRAUDS—UNLAWFUL DETAINER.—A verbal lease of land entered into August, 1888, by which the term was to begin in March, 1889, and end March 1, 1890, is within the prohibitions of the statute of frauds, and is no bar to an action of unlawful detainer. *Beiler v. Devoll*, 251.

2. SERVICE OF NOTICE TO QUIT.—The service of notice to quit upon the wife of the tenant is sufficient. *Ib.*

3. TRESPASS—NOTICE OF PLAINTIFF'S RIGHT—LESSOR AND LESSEE—DEFENDANT'S CONTRACTOR.—W., the owner, in November, by a mere parol lease, rented his farm for a year to plaintiff, who was to go into possession in March following. In January or February following, this contract was so modified as to make plaintiff an allowance for a right-of-way strip through the farm about to be sold by W. to the defendant railway company. On January 12, the defendant contracted the construction of road-bed to MacR., whose sub-contractors cleared the right of way in February, and on March 4 began the grading and completed it in the succeeding October. Said contractors threw down the fences whereby cattle entered upon the fields cultivated by plaintiff as tenant under his renting contract. For such damage so occasioned plaintiff brought trespass against the defendant railway. *Held*—

   (1) That, though defendant might be held as a cotrespasser with the contractor MacR. if, at the time of making its contract with him, it could be charged with notice of the rights of plaintiff in the land (if any), yet the law does not charge one with notice of such a lease, and prior to taking possession a tenant under a verbal lease has no estate in lands.

   (2) That those engaged in the construction of the road were in no sense the servants of the defendant.

   (3) That the provisions of the contract that the work should be performed under the supervision of defendant's chief engineer, at whose directions objectionable employes should be discharged, do not have the effect to make the contractor and his employes the servants of the defendant. *McKinley v. Chicago, S. F. & C. Ry. Co.*, 449.

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LAWS.

CONSTRUCTION—TIME OF TAKING EFFECT.—Under section 16 of the act of 1889, "declaratory of the revised statutes," the law of 1889, changing the time for the holding of the circuit court of Wayne county, took effect as to all its provisions and not merely as to that providing for such change, ninety days after the adjournment of the legislature. *Honeycutt v. St. Louis, I. M. & S. Ry. Co.*, 674.

LICENSE.

1. CONTRACT—GROWING TIMBER.—An unsealed and unacknowledged written contract, whereby, for a valuable consideration to be thereafter paid, growing timber on a certain piece of land is sold, is a mere executory contract and conferred but a license to remove the trees. *Potter v. Everett*, 152.

2. GROWING TREES—REALTY—LICENSE TO ENTER AND REMOVE. Whatever may be the law elsewhere, growing trees, standing on land, are, in this state, a part of the realty and must so remain until severed therefrom, and the title to them while so standing can be passed and acquired only by a statutory deed; and an intention on the part of the licensor and the licensee, evinced by contract, that the latter shall within a reasonable time enter, sever and remove such growing trees, does not have the effect to convert the same into personal property, until the license is exercised and this, though the license within certain limits be irrevocable. *Ib.*

3. EXECUTION—PROPERTY SEIZED UNDER—CLAIMED BY ANOTHER. When the rights of a licensee to enter, sever and cut growing trees are interfered with by means of an execution, his remedy for such wrong cannot be pursued under the provision of sections 2366, *et seq.*, Revised Statutes, 1879. *Ib.*

4. ——— PERSONAL TRUST NOT VENDIBLE.—A license to enter upon another's land and sever and remove standing trees therefrom is in its nature a personal trust, and not the subject of a levy and sale under execution. *Ib.*

LOCAL OPTION.

VALIDITY OF ELECTION.—An election under the local-option act is invalid, if it be held within sixty days of a municipal election, though the latter election was had without sufficient notice. *State ex rel. v. Bowerman*, 576.

MANDAMUS.

CRIMINAL LAW—ACTION OF COUNTY COURT IN AUDITING FEE BILLS.—A county court acts ministerially in auditing the fee bills of justices of the peace and constables for costs in criminal cases, after the proper certification thereof by the judge of the circuit

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court and the prosecuting attorney; and *mandamus* is a proper remedy, if a county court refuses to perform its duty in this respect. *State ex rel. v. Heege*, 650.

MARRIED WOMEN. See HUSBAND AND WIFE, 1, 2, 3; JUDGMENT, 1.

1. ESTOPPEL.—The fact, that a promise made by a married woman has been acted upon by the promisee, does not estop the married woman from denying the validity of the promise on the ground of her inability to contract. *Saulsbury v. Corwin*, 373.

2. CONTRACTS.—A married woman cannot by ratification or renewed promises render effective a promise, which was made by her while she was unmarried, but which did not become binding on her prior to her marriage. *Ib.*

3. PARTIES—ACTION TO CHARGE MARRIED WOMAN'S SEPARATE ESTATE. If a married woman die pending an action in equity to charge her separate estate, in realty, the suit can only proceed against those who succeed to her title; and her administrator is not a necessary or proper party. *Clifton v. Anderson*, 616.

MASTER AND SERVANT.

1. DAMAGES.—When a person is held liable for wrongfully and maliciously procuring the discharge of a servant by his master, the measure of damages is the same as in the case of a suit by the servant against the master for a wrongful discharge. *Lally v. Cantwell*, 44.

2. ——— BURDEN OF PROOF.—The burden of proving in such case, in mitigation of damages, what the servant earned or could have earned during the period of time in question, is on the defendant. And proof that the servant secured other employment during such period, without any evidence as to what was earned by him, *held* not to entitle the defendant to complain that the jury did not make sufficient allowance for such earnings in their verdict. *Ib.*

3. NEGLIGENCE—ALITER EGO—FOREMAN OF SECTION GANG.—Under the facts of this case, it is *held*, that the foreman of the section "gang" in charge of the hand car was *pro hac vice* the defendant corporation, and his full knowledge of the condition of the hand-car handle as well as the situation of an accompanying hand car was the knowledge of the defendant. *Banks v. Wabash Western Ry. Co.*, 458.

4. CONTRIBUTORY NEGLIGENCE—DEFECTIVE IMPLEMENTS—INSPECTION.—The duty of inspecting implements furnished for use by the master does not rest upon the servant; but he has the right to assume, in the absence of knowledge to the contrary, that the implement is reasonably safe. If there are latent

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defects of which he has no knowledge, or which are not obvious to him while using ordinary care and observation, then he does not assume the risks attendant thereon. (Instructions set out in the opinion.) *Ib.*

MECHANICS' LIENS.

1. PRINCIPAL AND SURETY.—The surety for the performance on the part of the contractor of a contract for the erection of building is liable for the costs properly taxed in a suit for the establishment of a mechanic's lien; but also *held* (THOMPSON, J., *dissenting*) that such liability will not extend to costs incurred in the advertisement and sale of the property subjected to lien, since these could have been avoided by payment of the lien, when established by the judgment. *LaFayette Building Ass'n v. Kleinhoffer*, 388.

2. ——— PRESUMPTIONS.—The costs taxed in the suit for the establishment of such lien are *prima facie* correct. *Ib.*

3. ——— JUDGMENT AGAINST PRINCIPAL.—*Semble*, that a judgment against the contractor for the erection of a building, establishing a mechanic's lien, is *prima facie*, but not conclusive, evidence of such lien as against a surety of such contractor. *Ib.*

MINOR. See APPRENTICES, 1; CUSTOM, 1.

MORTGAGE. See PUBLIC ROADS, 6.

1. EMBLEMENTS—AS BETWEEN MORTGAGOR AND MORTGAGEE. Annual crops planted on mortgaged lands by the mortgagor, or by one claiming under him, and remaining unsevered at the time of the foreclosure of the mortgage, but subsequently severed by the mortgagor while still in the possession of the lands, pass to the purchaser at the foreclosure sale as against the claims of the mortgagor, or of such claimant under him, provided that they were sown after the condition broken; *sed aliter*, if such crops were planted before condition broken. *Hayden v. Burkemper*, 346.

2. CONVERSION—RECORD NOTICE.—If a mortgagor rightfully in possession of mortgaged cattle delivers the same to his commission merchant, who without actual notice of the mortgage sells and accounts to him for the proceeds, the merchant will be liable to the mortgagee for conversion, as the record of the mortgage gave notice to all dealing with the cattle whether within or without the state, and took the place of a change of possession, and the case stands as if the cattle had been taken from the mortgagee's possession by the mortgagor. *LaFayette County Bank v. Metcalf*, 494.

3. ——— SALE BEFORE DEFAULT.—A mortgagor in possession may, generally before condition broken, sell and deliver the mortgaged property, but such sale must be in recognition of

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and not in antagonism to, the mortgage; and, if the sale is such as purports to convey complete title, the mortgagee has immediate right to the possession; and, if the mortgagor's vendee destroys the property or materially alters its condition, it is a conversion, and the mortgagee has his action. *Ib.*

4. ——— DEMAND.—The office of a demand is evidential and not creative. A wrongful sale constitutes an actual conversion and when shown dispenses with a demand. *Ib.*

NEGLIGENCE. See RAILROADS, 6.

1. COMMON CARRIERS—LIMITATION OF LIABILITY.—A common carrier cannot, by contract, limit the extent of his liability for his negligence. And a stipulation by the carrier that his liability should not exceed a stated sum, unless the value of the property should be disclosed, will not relieve the carrier from liability for the actual value of the property, in case of the loss thereof through his negligence in the carriage of it, though the shipper, on demand by the carrier, refused to state the amount of its value, and though a larger charge would have been made for its carriage and it would have been differently carried, than was done, if such value had been disclosed. *Conover v. Pacific Express Co.*, 31.

2. CONTRIBUTORY—DEMURRER TO EVIDENCE.—Defendant's railroad had two tracks running east and west—the north one used by west-bound trains—the south one by east-bound trains. Plaintiff's father had, prior to his employment by defendant, worked near a railroad. He was employed in a gang building a fence on the north side of the two tracks. His part of the work was to carry posts scattered along on the south side of the two tracks across them to the north side. He was working about two hundred feet west of a sharpe curve which prevented a west-bound train on the north track being seen at a distance greater than that. Defendant was crossing back south after posts when he encountered an east-bound freight train on the south track and he stopped on the north track just inside of the south rail apparently waiting for the freight train to get by and apparently watching its movements only. While at this place and in this position, a passenger train from the east on the north track coming around the curve at a speed of thirty-five or forty miles an hour ran over and killed him. This was the deceased's third day's work at this place, during which time trains had been constantly passing, and the foreman had cautioned the men to be careful. *Held,*—

(1) That the death of deceased was directly brought about by his own negligence. (*Distinguishing Gessley v. Railroad,* 32 Mo. App. 413.)

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(2) That, though the foreman be regarded as vice-principal and was guilty of negligence in not placing out a watchman, deceased knew of such negligence and continued in the service without complaint.

(3) That it was *error* to overrule a demurrer to plaintiff's evidence. *Harris v. Mo. Pac. Ry. Co.*, 255.

3. WHAT IS PROXIMATE CAUSE—LIABILITY FOR.—In determining what is the approximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act; and the guilty actor will be liable for such immediate result as ought or would have been expected or anticipated by a reasonably prudent person as likely to flow from the commission of the wrongful act. On the facts of this case, as found by the jury, it is *held*, that a defective handle of a hand car negligently furnished by defendant to plaintiff, its servant, was the proximate cause of the plaintiff's injury, and defendant is liable therefor, as the immediate, natural and probable consequence of the negligent act. *Banks v. Wabash Western Ry. Co.*, 458.

4. MASTER AND SERVANT—ALITER EGO—FOREMAN OF SECTION GANG. Under the facts of this case, it is *held*, that the foreman of the section "gang" in charge of the hand car was *pro hac vice* the defendant corporation, and his full knowledge of the condition of the hand-car handle as well as the situation of an accompanying hand car was the knowledge of the defendant. *Ib.*

5. CONTRIBUTORY NEGLIGENCE—MASTER AND SERVANT—DEFECTIVE IMPLEMENTS—INSPECTION.—The duty of inspecting the implements furnished for use by the master does not rest upon the servant; but he has the right to assume, in the absence of knowledge to the contrary, that the implement is reasonably safe. If there are latent defects of which he has no knowledge, or which are not obvious to him while using ordinary care and observation, then he does not assume the risks attendant thereon. (Instructions set out in the opinion.) *Ib.*

6. RAILROADS.—In an action against a railway company for personal injuries caused by the derailment of a car, a plaintiff makes out a *prima facie* case by proof that he was injured by the accident, without fault on his part, while traveling as a passenger on the car. *Norton v. St. Louis & H. Ry. Co.*, 642.

7. ——— ACTION OF INJURED PERSON INDUCED BY DANGER.—If a passenger on a railroad car, which has been derailed by the negligence of the railroad company and is in danger of overturning, jumps from the car while in motion, in order to escape peril, and

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receives injuries in so doing, it is no defense to his action for such injuries to say that he was unnecessarily alarmed, and that he would have escaped injury if he had remained on the car. *Dimmitt v. Hannibal & St. J. Ry. Co.*, 654.

8. ——— BURDEN OF PROOF.—In a suit for such injuries the plaintiff establishes a *prima facie* case by proof that he was a passenger on the railroad car and that he received the injuries complained of in consequence of the derailment of the car; the burden of proof is then upon the railroad company to show that there were no acts of negligence, either of omission or commission, by any of its servants contributing to the accident, and that the derailment of the car was occasioned by inevitable casualty which the utmost skill and diligence could not have prevented, or by the act of a stranger which it, the railroad company, could not have foreseen or anticipated. *Ib.*

9. ——— ACTS OF STRANGERS. If a duty or service obligatory upon a servant of a railway company be negligently performed by a stranger, the railway company is responsible for damages occasioned to passengers on one of its trains through such negligence, if the stranger performed such duty or service at the request or with the assent of such servant, or in the presence of, and without objection on the part of, such servant. *Ib.*

NOTICE. See LANDLORD AND TENANT, 2; MORTGAGE, 2; PRINCIPAL AND AGENT, 1, 3; PUBLIC ROADS, 4.

NUISANCE.

1. DAMAGES TO THE INHERITANCE—LOSS OF RENTS. In an action to recover damages for the creation of a nuisance, where the evidence tended to show that the injury to plaintiff's premises was such that it did not stop with the existence of a nuisance, but effected a permanent injury to the value thereof, it is not error to instruct the jury, in estimating plaintiff's damage, any permanent depreciation in the value of his real estate occasioned by the nuisance might be considered. *Babb v. Curators of State University of Mo.*, 173.

2. FORECLOSURE PURCHASER LIABLE FOR RECEIVER'S ACTS.—A purchaser of a railroad at a foreclosure sale, who has no direct agency in the act complained of, will not ordinarily be liable for an act of the receivers operating the road prior to the sale; but if the act of the receivers created a nuisance, which was in existence at the time of the purchase. and the purchaser then had notice of the acts constituting the nuisance and continued the nuisance afterwards, and in consequence thereof plaintiff's land was overflowed, rendered untillable and his crops injured, the purchaser is liable. *George v. Wabash Western Ry. Co.*, 433.

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3. DEFINITIONS.—A nuisance, in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property which violates the rights of another is in an essential degree a nuisance. *Ib.*

4. FLOODING LAND—A CONTINUING ONE—NOTICE.—The making an excavation under a railroad track, and removing the original earth thereat, and thereby diverting the waters of a creek from its former channel and emptying them upon land theretofore dry and tillable, where said waters did not before run or flow, constitute a nuisance, and the maintenance of said excavation and its results is a continuing nuisance. *Ib.*

ORDINANCE. See PLEADING, 11; RAILROADS, 5.

OWNERSHIP.

EARNINGS.—Whether plaintiff was the absolute owner of certain race horses, or was simply in control thereof for the season, to be used as he saw fit, he was entitled to all their earnings. *Bruen v. Kansas City Fair Ass'n*, 425.

PARTIES. See JUSTICES' COURTS, 9; PRACTICE, TRIAL, 10.

1. ACTION TO CHARGE MARRIED WOMAN'S SEPARATE ESTATE.—If a married woman die pending an action in equity to charge her separate estate in realty, the suit can only proceed against those who succeed to her title; and her administrator is not a necessary or proper party. *Clifton v. Anderson*, 616.

2. ——— JUDGMENT.—If only her administrator is made a party defendant, the judgment will be void, and though the person acting and made a party as administrator succeed as an individual to a portion of the married woman's title, as if he be tenant by the curtesy, such interest as an individual will not be bound by the judgment. *Ib.*

PARTNERSHIP.

PRINCIPAL AND AGENT—PRINCIPAL'S RATIFICATION OF AGENT'S CONTRACT AND NOTICE AS TO DISPOSITION OF PROCEEDS—SALARY.—The plaintiff engaged A. to travel with, enter and race certain horses for the season, and, as compensation for his services, A. was to receive one-half of the net winnings. In absence of winnings plaintiff was to bear all expenses, and all entries were to be made in his name. A. entered the horses at the defendant's races in the rame of R. Plaintiff informed defendant the horses were his and all winnings were to be paid to him and not to A. or R. Both horses won and plaintiff demanded the winnings but defendant paid them to R. *Held*—

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(1) The arrangement between plaintiff and A. did not constitute a partnership, wanting community of all profits and losses; but made A. the agent of plaintiff.

(2) Where the principal intervenes and demands the beneficial results of a contract made by his agent, and where the third party, in face of the demand and warning by the principal insisted upon payment over to the agent, after the agent's authority had been extinguished, then such payment was at its peril and it must respond again to the demand of the principal.

(3) While the plaintiff adopts the contract of entry, in so far as to demand benefits arising therefrom, he must also assume the burdens attached and meet the delinquent entrance fees. *Bruen v. Kansas City Fair Ass'n*, 425.

PENALTY.

1. CIVIL ACTION—COSTS.—An action against a railroad company to recover the penalty prescribed by section 806, Revised Statutes, 1879, is a civil action and in its nature *qui tam;* and costs should be taxed according to the statute relating to costs in civil, and not in criminal, cases. *In re Green*, 491.

2. ACTION FOR, HOW BROUGHT—TAXATION OF COSTS.—The action for such penalty under said section should be brought in the name of the state at the relation of the prosecuting attorney, on the information of the informer, and against the railroad company; and, in case the action is unavailing, the informer, who is the real actor and the party beneficially interested in the suit, should pay the costs. *Ib.*

PERFORMANCE.

BUILDING CONTRACT—SUBSTANTIAL PERFORMANCE—TRIVIAL DEFECTS—INSTRUCTIONS.—In an action by the owner against the contractor for breach of contract for building a house it is *error* to instruct the jury that if defendant had substantially performed his contract according to the plans and specifications that plaintiff could not recover, even though these were trivial defects. *Boteler v. Roy*, 234.

PERSONAL INJURY. See ABATEMENT, 1; ACTION, 1; DAMAGES, 11.

1. ACTION FOR—PHYSICAL EXAMINATION OF PLAINTIFF.—The defendant in an action for personal injuries to the plaintiff has no absolute right to an order of court for the examination of the person of the plaintiff by medical experts; the making of such order rests in the discretion of the court, and a refusal to make it will not be disturbed unless an abuse of such discretion is shown. *Norton v. St. Louis & H. Ry. Co.*, 642.

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2. PRACTICE, APPELLATE—REVIEWING FINDING OF DAMAGES.—In an action for personal injuries, the policy of the law is to leave the determination of the damages, under proper instructions, to the judgment of the individual jurors, and not to interfere, unless it is manifest that the verdict was the result of passion or prejudice. And *held*, in the case at bar, that there was no such warrant for such interference, though the damages allowed seemed large and rather out of proportion to the injuries received, the verdict being two thousand dollars, and the injuries consisting of a bad sprain of the ankle and a rupture or great sprain of the ligaments in the ankle joint. *Dimmitt v. Hannibal & St. J. Ry. Co.*, 654.

PHYSICIAN. See CRIMINAL LAW, 4; PERSONAL INJURY, 1.

PLEADING.

1. MITIGATION OF DAMAGES.—In actions for personal injuries evidence in mitigation of damages is admissible under a general denial. *Beck v. Dowell*, 71.

2 WAIVER—REPLY.—When a petition upon a written contract alleges specific performance of the conditions and obligations on the part of plaintiff, there can be no recovery upon a waiver not pleaded; nor can such waiver, on denial of performance in the answer, be set in the reply as the denial makes the issue complete, and the waiver is inconsistent with the allegation of performance in the petition, nor can such allegation in the reply cure the defect of the petition. *Mohney v. Reed*, 99.

3. RECOVERY.—Plaintiff can recover upon no other cause of action than that upon which he declares. *Price v. Chicago, M. & St. P. Ry. Co.*, 189.

On rehearing.

4. CONTRACT—INDUCEMENT—QUANTUM MERUIT.—On a further examination the court is confirmed in the opinion that this action is on a written contract for building a house and not upon *quantum meruit*, and that the contract is not pleaded as an inducement to another action. *Ib.*

5. WAIVER—PLEADING SCIENTER.—In order to constitute a waiver there must be knowledge of the true situation, and, in pleading a waiver, there should be an allegation that, knowing the contract had not been performed, the defendant accepted, etc. *Ib.*

6. WAIVER OF PERFORMANCE V. WAIVER OF DAMAGES.—The fact that the reply only pleads a waiver of damages, and not a waiver of performances (if a fact), can make no difference, as the establishment of either will suffice. *Ib.*

7. ANSWER TO INTERPLEA—INDEBTEDNESS.—An answer to an interplea need not allege defendant's indebtedness to plaintiff, where the interplea itself admits it. *Meyberg v. Jacobs*, 128.

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8. BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—CONDITION PRECEDENT.—A stipulation in a building contract that payment shall be made on the estimate and certificate of the architects is a condition precedent and should be pleaded, and its performance alleged and proved. But no special statement of facts showing performance is necessary; a general statement that the party has performed all the conditions of the contract on his part is sufficient under the statute of this state. *Roy v. Boteler*, 213.

9. WAIVER—EVIDENCE—ARCHITECT'S CERTIFICATE.—Under a general allegation of performance of all the conditions of a contract, evidence of a waiver of performance of such conditions is inadmissible, and the fact that an architect's certificate may have been made in a certain manner at the defendant's request cannot alter the rule; but modifications or alterations of the contract, and a waiver or estoppel must be pleaded. *Ib.*

10. INJUNCTION—CLOUD ON TITLE—SUFFICIENCY OF PETITION.—Where a petition, as in this case, shows that the defendant had of record an apparent right to sell the plaintiff's land and make a title thereto superior to the plaintiff's, but that in the light of the facts outside the record, and which rest in parol, and can only be shown by extrinsic testimony, the defendant has no such right, such petition shows that plaintiff is entitled to equitable relief and an injunction. *Bank of Tipton v. Davidson*, 421.

11. EVIDENCE—ESTOPPEL—INSTRUCTION.—On an examination of the pleading and evidence it is *held* that neither plaintiff's replication nor his evidence was sufficient to support an instruction embodying an estoppel. *Werner v. O'Brien*, 483.

12. ACTION FOR RECOVERY OF FINE UNDER MUNICIPAL ORDINANCE. The sufficiency of a statement of a cause of action for the recovery of a penalty for the violation of a municipal ordinance is not tested by the rules appertaining to criminal proceedings; only that degree of certainty is requisite, which is necessary to inform the defendant of what he is called upon to answer. *City of Springfield v. Ford*, 586.

13. VARIANCE.—When the petition in an action for the recovery of benefits, in the nature of insurance, alleges an unconditional contract to pay such benefits, while the evidence establishes only a contract to pay on the performance of certain conditions precedent, this difference constitutes only a variance, and such variance is not material when it could not have misled the defendant. *Heffernan v. Supreme Council Amer. Legion of Honor*, 605.

POSSESSION.

INSTRUCTION—INDEFINITE DESCRIPTION—INTENTION OF GRANTOR.—In a contest between two grantees of the same grantor, where the older conveyance was indefinite in its description of the premises intended to be conveyed, it is not *error* to admit parol

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evidence as to the intention of the grantor to convey to the older grantee the land claimed to be embraced in the conveyance to the subsequent grantee, and to instruct the jury that if the grantors in the former conveyance intended and understood they were conveying the premises in dispute to the grantees therein, and that said grantees, believing said deed, conveyed said premises to them, and, under and by virtue thereof, took possession of said premises, and have ever since that time—more than ten years—held possession thereof, and now have possession of the same, then said former grantees are entitled to recover, etc. *Thornton v. Mo. Pac. Ry. Co.*, 265.

PRACTICE, APPELLATE.

1. AFFIRMANCE—DAMAGES.—A demand for an affirmance with damages *held* warranted on the ground that every proposition urged by the appellant had been determined adversely to him by prior decisions of the supreme court and this court. *President Mining & Milling Co. v. Coquard*, 40.

2. RES ADJUDICATA.—When a cause has been once appealed and, being remanded, is tried in accordance with the opinion of the appellate court, error cannot be assigned of the rulings of the trial court in so doing, the decision of the appellate court being *res adjudicata*. *Lally v. Cantwell*, 44.

3. NON-PREJUDICIAL ERROR.—The admission by the trial court of evidence establishing merely a state of fact, which the law would have presumed in the absence of evidence, *held* not prejudicial. *Beck v. Dowell*, 71.

4. PREJUDICIAL ERROR.—Error in the admission of such evidence against proper objection is prejudicial, even though other evidence properly admitted in the cause may have led to a surmise of the state of the plaintiff's pecuniary condition. Error is presumed to have been prejudicial unless the contrary appear from the record. *Ib.*

5. OBJECTIONS TO EVIDENCE WHEN CONSIDERED.—The grounds of objection to the admission of evidence must be pointed out at the trial—must be distinctly specified—or they will not be noticed by the appellate court. *Babb v. Curators of State University of Mo.*, 173.

6. EQUITY V. LAW—OBJECTION.—The objection, that the issues in this case were of equitable cognizance, comes too late in the appellate court, as plaintiff submitted without objection to the manner of the trial below. *Leitch v. Miller*, 180.

7. INSTRUCTIONS—MOTION FOR NEW TRIAL.—Objections to instructions will not be considered when the trial court's attention has not been called to them in the motion for a new trial. *Price v. Vanstone*, 207.

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8. Abstract.—Matter not present in the abstract of the record will not be considered in the appellate court. *Bensberg v. Turk*, 227.

9. Res adjudicata—second appeal.—When a case has been decided upon solemn argument and again comes to the appellate court by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision; whatever was passed upon must be regarded as *res adjudicata*. *Koch v. Hebel*, 241.

10. Irregular verdict for the right party not disturbed.—A verdict for the right party and not excessive, though irregular, will not be reversed. *Beiler v. Devoll*, 251.

11. Objection to evidence.—Objections to the admissions of evidence cannot be made for the first time in the appellate court. *Thornton v. Mo. Pac. Ry. Co.*, 265.

12. Criminal law.—When the evidence in the trial of a criminal prosecution is insufficient in law to establish the offense charged, the defendant, on appeal, is entitled to a discharge in the appellate court. *State v. Brinkman*, 284.

13. Weighing the evidence.—If a verdict is supported by substantial evidence, it will not, on appeal, be disturbed on the ground that it is against the weight of the evidence. *Meyer v. Stone*, 289.

14. Errors assigned by the appellee.—When there is no cross-appeal, the appellee is not in a position to complain of the judgment appealed from. *Ib.*

15. Non-prejudicial error.—Although it is erroneous for a trial court to give an oral instruction to the jury, still the instruction is not prejudicial, and is not ground for the reversal of the judgment appealed from, if it relates wholly to a conceded matter. *Walsh v. St. Louis Drayage Co.*, 339.

16. Necessity for bill of exceptions.—A motion is not a part of the record of a cause, unless it is made so by a bill of exceptions, nor can a ruling upon it be reviewed, if it be not incorporated in the bill of exceptions; and this applies to a motion by an attaching creditor for leave to defend a prior attachment proceeding against the attachment debtor. *Monroe City Bank v. Finks*, 367.

17. Points not raised in trial court.—Neither a defense based upon the statute of frauds, nor an objection to the right of the appellee to explain an ambiguity in a writing by parol evidence, can be urged on appeal, when the record does not show that the point was raised in the trial court. *LaFayette Building Ass'n v. Kleinhoffer*, 388.

18. Error induced by the appellant.—Nor is error assignable by an appellant with respect to an instruction to the jury, or a course of ruling by the trial court, which was in accordance with the theory on which he tried the cause. *Ib.*

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19. RULE 15—ABSTRACT—SUPPLEMENTAL ABSTRACT.—Rule 15 requires the abstract to set forth so much of the record as is necessary to a full understanding of all the questions presented to the appellate court for decision; and such court will not look beyond the abstract for information upon which to determine such question; and such matter must be set out in the first or original abstract and not in a so-called supplemental abstract. *Bank of Tipton v. Davidson*, 421.

20. DUTY TO REVIEW JUDGMENT ON UNDISPUTED FACTS.—The material facts being undisputed, it is the duty of the appellate court to review the action of the trial court thereon and decide if its judgment is warranted by such facts. *Bruen v. Kansas City Fair Ass'n*, 425.

21. ABSTRACT—APPEAL DISMISSED.—Where the appellant fails to file a printed abstract of the record setting forth so much thereof as is necessary to a full understanding of the question presented for appellate decision, the appeal will be dismissed. *Hattan v. The Nevada Mining Co.*, 448.

22. JOINDER IN ERROR.—Sections 3764 and 3765, Revised Statutes, 1879, have been omitted from the revision of 1889, and it is not now required to assign and join in error more than such assignment may be made by briefs required by section 2301 of the late revision. *Donnell Mfg. Co. v. Hart*, 512.

23. NON-PREJUDICIAL ERROR.—The judgment appealed from will not be reversed by this court for non-prejudicial error. *State ex rel. v. Crowder*, 336.

24. WEIGHING THE EVIDENCE.—This court will not reverse a judgment at law on the ground that the verdict is, in its opinion, against the weight of the evidence. *Walton v. Kansas City, Ft. S. & M. Ry. Co.*, 544.

25. PRESUMPTIONS.—All error is presumed to have been prejudicial, unless it affirmatively appears that it was not so. *Ib.*

26. BILL OF EXCEPTIONS.—The ruling of a trial court in dismissing a cause upon motion of the appellee cannot be reviewed on appeal, if the motion, though copied into the transcript, is not preserved by the bill of exceptions. *Treice v. Holladay*, 575.

27. FAILURE TO SAVE EXCEPTIONS.—Neither a rule permitting an amendment of the pleadings, nor one on the admissibility of evidence, can be reviewed on appeal, if no exception thereto is saved. *City of Springfield v. Ford*, 586.

28. WEIGHT OF EVIDENCE.—The fact that the weight of the evidence in an action at law is with the appellee will not prevent a reversal of the judgment appealed from, when there was prejudicial error in the trial of the cause. *Heffernan v. Supreme Council Amer. Legion of Honor*, 605

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29. FILING TRANSCRIPT.—An order of the trial court extending the time for the filing of the bill of exceptions beyond the time allowed appellant for the filing of the transcript in this court is, *prima facie*, good cause for the failure of the appellant to duly file such transcript; but such order is not conclusive, and if it is affirmatively shown to have been unnecessary and unwarranted, it will not constitute such good cause. *Town of Kirkwood v. Cairns*, 631.

30. REVIEWING FINDING OF DAMAGES.—In an action for personal injuries, the policy of the law is to leave the determination of the damages, under proper instructions, to the judgment of the individual jurors, and not to interfere, unless it is manifest that the verdict was the result of passion or prejudice. And, *held*, in the case at bar, that there was no such warrant for interference, though the damages allowed seemed large and rather out of proportion to the injuries received, the verdict being two thousand dollars, and the injuries consisting of a bad sprain of the ankle and a rupture or great sprain of the ligaments in the ankle joint. *Dimmitt v. Hannibal & St. J. Ry. Co.*, 654.

31. ASSIGNMENT OF ERROR.—An assignment of error on general terms, which is applicable to a number of similar rulings of the trial court and does not point out to which of these rulings it refers, is not properly made. *Martin v. Fox*, 664.

32. ———. Errors may be assigned by brief, but it is the duty of the appellant to specifically point out the errors complained of, and a general assignment of error, applicable as well to one as to another of a number of different rulings of the trial court, is insufficient. *Held*, accordingly, that an assignment, that "the court erred in admitting illegal, improper and irrelevant evidence offered by the plaintiffs against the defendant's objections," was insufficient, the record disclosing a number of exceptions to rulings of this kind. *Honeycutt v. St. Louis, I. M. & S. Ry. Co.* 694.

33. ———. If an assignment of errors be made by brief, it is improper to throw together a number of alleged errors of different kinds in a single paragraph, and to cite authorities *en masse* under it. Each alleged error should be separately assigned, and the authorities relied upon in support of it should be cited separately in connection with it. *Ib.*

34. ——— WEIGHING THE EVIDENCE.—In an action at law an appellate court has nothing to do with the mere weight and preponderance of the evidence, and an assignment of error, that "the verdict was manifestly against the weight and preponderance of the evidence," is not a specification of error which is assignable in such an action in this court. *Ib.*

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85. ——— REVIEWING FINDING OF DAMAGES.—Although an award by the jury in an action for personal injuries may seem large, it cannot be interfered with by an appellate court, unless it is so large as plainly to show passion, prejudice or a disregard of the evidence by the jury. And *held* that interference was not warranted in this case, the verdict therein being for twenty-two hundred and fifty dollars for injuries to the right hand of the plaintiff. *Ib.*

PRACTICE, TRIAL.

1. SAVING EXCEPTIONS.—*Semble,* that the mere failure of a party to expressly save an exception to an adverse ruling should not debar such party from assigning error of such ruling; an exception should be presumed. *Beck v. Dowell,* 71.
2. OBJECTION TO JURY ARRAY.—The objection that the prevailing party in an action was a member of the county court that selected the regular panel, from which the jury in the cause was drawn in the trial, should be presented by challenge to the array before trial, and comes too late after the verdict, though the complaining party had no knowledge of the fact till after the verdict, unless it is known that substantial injustice had been done. *Boteler v. Roy,* 234.
3. OMISSION TO FILE INSTRUMENT SUED ON.—On the failure of a plaintiff to file an instrument of writing sued on, the defendant may move for the dismissal of the cause, but such failure is not ground for the exclusion of the writing, when offered in evidence at the trial. *Graham v. Morstadt,* 333.
4. DEMURRER TO EVIDENCE.—On a demurrer to the evidence the court must indulge every inference of fact in favor of the party offering the evidence, which a jury might indulge with any degree of propriety, and though, on a review of the evidence in this case, it may be found in some respects scant, there is not such total absence thereof as authorizes the withdrawal of the case from the jury. *George v. Wabash Western Ry. Co.,* 433.
5. EVIDENCE--OBJECTION—INSTRUCTION.—Although evidence was introduced upon an erroneous assumption, objection thereto cannot be made for the first time in the appellate court, and it is not error to refuse instructions that are but repetitions of others given. *Keystone Implement Co. v. Leonard,* 477.
6. DEMURRER TO EVIDENCE.—Every reasonable inference of fact to be drawn from the evidence is to be thrown on the side of the plaintiff in passing on a demurrer to the testimony. *Davis v. Clark,* 515.
7. ORDER OF PROOF.—The order of proof is a matter mainly within the discretion of the trial court, and its ruling thereon will not be reversed when there is nothing showing an abuse of its discretion. *Pilcher v. Jones,* 583.

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8. CHANGE OF VENUE.—A change of venue may be taken in the circuit court in a cause appealed thereto from a justice of the peace. *Clements v. Greenwell*, 589.

9. ———. The application for a change of venue must be verified by the affidavit of a party to the cause; but objection to the granting of it, because it is not thus verified, must be made in the court granting it, and cannot be urged in the court to which the venue is changed. *Ib.*

10. AMENDMENT OF PARTIES.—The complete change of parties plaintiff, by the substitution of a new plaintiff for the one in whose name the action was commenced, is a change of the cause of action, and, therefore, is not a proper amendment. *Ib.*

11. BILL OF PARTICULARS.—The practice of demanding a bill of particulars in a criminal case has never prevailed in this state. *State v. Quinn*, 627.

12. PERSONAL INJURIES, ACTION FOR—PHYSICAL EXAMINATION OF PLAINTIFF.—The defendant in an action for personal injuries to the plaintiff has no absolute right to an order of court for the examination of the person of the plaintiff by medical experts; the making of such order rests in the discretion of the court, and such ruling will not be disturbed unless an abuse of such discretion is shown. *Norton v. St. Louis & H. Ry. Co.*, 642.

13. UNWARRANTED NUMBER OF INSTRUCTIONS.—When the number of instructions asked by a party is unwarrantably large, as where twenty-five are asked by a party in a cause in which the issues are simple and few, the trial court is justified in refusing all the instructions asked. *Ib.*

14. REMARKS IN ARGUMENT OF COUNSEL.—When counsel in argument to the jury by their remarks attempt to make a case, which they would not be allowed to establish by evidence, their conduct, if objected to at the time and allowed to pass unrebuked, is ground for a new trial at the instance of the opposite party. Remarks in case at bar *held* to come within this rule. *Ib.*

15. PRESERVING EXCEPTIONS.—When improper remarks in the argument of counsel to the jury are matter of exception, they should be preserved by the bill of exceptions, and not brought to the attention of the court only by affidavits filed in support of the motion for a new trial. *Ib.*

16. PLEADING—CLAIM FOR PROPERTY LEVIED UPON.—When property levied upon under an execution is claimed by a third person, and an indemnifying bond is given by the execution plaintiff, which is returned to court, as provided by Revised Statutes, 1879, section 2367, and proceedings are then had in the circuit court, as provided by said section, the law contemplates that there shall be written pleadings, as in civil actions. *Martin v. Fox*, 664.

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17. THE SAME.—An answer filed by the execution plaintiff, merely denying that the claimant "is in good faith the lawful owner of the whole property," so levied upon and claimed, is insufficient to raise the issue that a sale of the execution debtor to the claimant, under which the claimant derived title to the property, was fraudulent as to the creditors of the debtor. *Ib.*

18. THE SAME.—If the execution plaintiff in such case seeks to hold the property on the ground that his judgment is for the purchase money thereof, and that the claimant is not a *bona fide* purchaser without notice, he should plead such claim. *Ib.*

19. PRESERVATION OF EXCEPTIONS BY MOTION FOR NEW TRIAL. Exceptions taken to the refusal of the trial court to check improper remarks of counsel to the jury, upon due objections thereto, are lost, if the objection thereto be not renewed by motion for new trial. *Honeycutt v. St. Louis, I. M. & S. Ry. Co.*, 674.

PRINCIPAL AND AGENT. See JUDGMENT, 6; RAILROADS, 7.

1. PRINCIPAL'S RATIFICATION OF AGENT'S CONTRACT AND NOTICE AS TO DISPOSITION OF PROCEEDS—PARTNERSHIP—SALARY. Plaintiff engaged A. to travel with, enter and race certain horses for the season, and as compensation for his services A. was to receive one-half of the net winnings. In absence of winnings plaintiff was to bear all expenses, and all entries were to be made in his name. A. entered the horses at the defendant's races in the name of R. Plaintiff informed defendant the horses were his and all winnings were to be paid to him and not to A. or R. Both horses won and plaintiff demanded the winnings, but defendant paid them to R. *Held*—

(1) The arrangement between plaintiff and A. did not constitute a partnership, wanting community of all profits and losses; but made A. the agent of plaintiff.

(2) Where the principal intervenes and demands the beneficial results of a contract made by his agent, and where the third party, in face of the demand and warning by the principal, insisted upon payment over to agent, after the agent's authority had been extinguished, then such payment was at its peril and it must respond again to the demand of the principal.

(3) While the plaintiff adopts the contracts of entry, in so far as to demand benefits arising therefrom, he must also assume the burdens attached and meet the delinquent entrance fees. *Bruen v. Kansas City Fair Ass'n*, 424.

2. CONVERSION—AGENT—ACT OF HOSTILITY TO TRUE OWNER.—One who finds himself in possession of property belonging to another, yet does nothing with the property or to the property in hostility

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to the true owner is not guilty of conversion; if an agent, however, does that (in this case sells fatted beef cattle, in the usual course, for slaughter and consumption) which cuts off the true owner's remedy to follow his property and hold him liable in whose hands he may discover it, he should be held in conversion, notwithstanding his ignorance of the true owner's claim. *LaFayette County Bank v. Metcalf*, 494.

3. NOTICE—PURCHASER.—Written notice of the existence of a nuisance served upon the chief engineer of the former railway company cannot impart notice to a corporation (not then in existence) that subsequently purchased the railway at foreclosure sale; but where such officer is retained in the service of the receivers, and, while so retained, acquired full knowledge of all the facts constituting the nuisance, and the continuation thereof, and is continued in the office in the service of the subsequent purchasers under such conditions as necessarily give rise to the inference that such knowledge remained fixed in his memory, when his employment by the purchaser began, then his knowledge must be deemed the knowledge of the purchaser. *George v. Wabash Western Ry. Co.*, 433.

4. ELECTION OF REMEDY.—A person who enters into a contract with the agent of an undisclosed principal may, after the disclosure of the principal, proceed against either the principal or the agent under the contract, but not against both; and, if after such disclosure, he proceeds against one, though unsuccessfully, he cannot thereafter proceed against the other. *Held*, accordingly, that recovery of judgment against the agent in a suit instituted after the disclosure of the principal, though the plaintiff was unable to collect it, was a bar to a subsequent suit against the principal. *Sessions v. Block*, 569.

PRINCIPAL AND SURETY.

1. CONSIDERATION.—An agreement, whereby one binds himself as surety for the performance by a contractor of a contract for the erection of a building, is invalid, if it is made after such contract has been entered into between such contractor and the party contracting with him, and without any new consideration. *LaFayette Building Ass'n v. Kleinhoffer*, 388.

2. MECHANIC'S LIEN.—The surety for the performance on the part of the contractor of a contract for the erection of a building is liable for the costs properly taxed in a suit for the establishment of a mechanic's lien; but also *held* (THOMPSON, J., *dissenting*) that such liability will not extend to costs incurred in the advertisement and sale of the property subjected to lien, since these could have been avoided by payment of the lien, when established by the judgment. *Ib.*

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3. —— PRESUMPTIONS.—The costs taxed in the suit for the establishment of such lien are *prima facie* correct. *Ib.*

4. —— JUDGMENT AGAINST PRINCIPAL.—*Semble*, that a judgment against the contractor for the erection of a building, establishing a mechanic's lien, is *prima facie*, but not conclusive, evidence of such lien as against a surety of such contractor. *Ib.*

PROHIBITION.

CERTIORARI.—A writ of prohibition should not issue when the applicant has an adequate remedy by *certiorari*. *State ex rel. v. Bowerman*, 576.

PROMISE. See FRAUDS AND PERJURIES, 1.

PROMISSORY NOTES.

1. BILLS AND NOTES—COMAKER—INDORSER.—Proof that a note was negotiated by the maker of it is not sufficient to charge as a comaker one, whose name appears on the back thereof after the name of the payee. *Marshall v. Cabanne*, 38.

2. NEGOTIABLE INSTRUMENTS—RIGHT OF ACTION.—One who holds a promissory note for collection may sue upon it in his own name, subject to the right of any defendant to make any defense which he could make against the real owner. *Saulsbury v. Corwin*, 373.

PUBLIC ROADS. See JUDGMENT, 5.

1. VACATION OF.—In a proceeding under the statute for the vacation of a county road by the county court, the right of freeholders to remonstrate is not confined to those whose lands are crossed or touched by the road, but such remonstrance may be filed by any twelve or more resident freeholders of the township or townships. *In re Big Hollow Road*, 368.

2. APPEAL—VACATION OF PUBLIC ROAD. The remonstrants in such a proceeding have the right of appeal to the circuit court from an order of the county court, vacating such road and assessing a part of the costs against them. *Ib.*

3. OBJECTIONS TO PROCEEDINGS—DESCRIPTION—TOWNSHIP CLERK—DE FACTO MEMBERS OF BOARD.—The following objections to the proceedings to establish a new road are *held* invalid in this case, to-wit:

(1) That the description was insufficient, where there could be no trouble in marking out the exact line therefrom.

(2) That the county court refused to command the clerk of township board to have his record say that the petition was not publicly read, when the court found the fact otherwise.

(3) That a member of the joint council board was not regularly commissioned. *Warren v. Gibson*, 469.

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4. NOTICE.—Notice when a petition for a new road will be presented to the township board need not be signed by any one. *Ib.*

5. OATH OF COMMISSIONERS.—The statute controlling proceedings before township boards for opening new roads does not require commissioners to take and subscribe an oath before proceeding to assess damages, but only demands them to make their report under oath. *Ib.*

6. MORTGAGEE NOT A PARTY TO PROCEEDINGS.—The mortgagor while in possession is to be regarded as the owner of the land for the purpose of condemning it for a public road, and a mortgagee does not come under the designation of "owners" of the land taken, and is not a necessary party to the proceedings. *Ib.*

7. APPEALS—COUNTY COURT—OPENING ROAD.—Petitioners in a public road have no such interest in the case as to carry with it the right of appeal from the judgment of the county court denying their petition. *Aldridge v. Spears*, 527.

8. THE SAME.—The road law permits appeals from the county court in certain specified cases; and from such enumeration the implication is clear that an appeal is denied in other cases, not specified, as the refusal of the petition to open a new road. *Ib.*

QUANTUM MERUIT.

1. IN AN ACTION of *quantum meruit* for services rendered, a recovery is not warranted in the absence of evidence either of the reasonable value of the services or of a special contract fixing the rate of compensation. The evidence in this cause considered, and *held* by a majority of the court not to support the verdict. *Sanford v. Cape Girardeau & S. W. Ry. Co.*, 15.

2. ACTION ON CONTRACT CHANGED TO.—On an examination of the evidence the court is confident plaintiff's action should be *quantum meruit. Mohney v. Reed*, 99.

3. CONTRACT—INDUCEMENT.—On a further examination the court is confirmed in the opinion that this action is on a written contract for building a house and not upon *quantum meruit*, and that the contract is not pleaded as an inducement to another action. *Ib.*

RAILROADS.

1. CHANGE OF ROADBED—FLOW OF WATERS OF STREAM.—A railway company, after having constructed its roadbed, has the right to make such changes therein, as experience may designate as proper, and this is a continuous right, but it cannot at pleasure make an improvement in its roadbed, which will interfere with the flow of the waters of a stream without reference to the rights of others. *George v. Wabash Western Ry. Co.*, 433.

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2. NUISANCE—FORECLOSURE PURCHASER LIABLE FOR RECEIVER'S ACTS.—A purchaser of a railroad at a foreclosure sale, who had no direct agency in the act complained of, will not ordinarily be liable for an act of the receivers operating the road prior to the sale; but if the act of the receivers created a nuisance, which was in existence at the time of the purchase, and the purchaser then had notice of the acts constituting the nuisance and continued the nuisance afterwards, and in consequence thereof plaintiff's land was overflowed, rendered untillable and his crops injured, the purchaser is liable. *Ib.*

3. FLOODING LAND—A CONTINUING ONE—NOTICE.—The making an excavation under a railroad track, and removing the original earth thereat, and thereby diverting the waters of a creek from its former channel and emptying them upon land theretofore dry and tillable, where said waters did not before run or flow, constitute a nuisance, and the maintenance of said excavation and its results, is a continuing nuisance. *Ib.*

4. ——— NOTICE—PURCHASER—PRINCIPAL AND AGENT.—Written notice of the existence of a nuisance served upon the chief engineer of the former railway company cannot impart notice to a corporation (not then in existence) that subsequently purchased the railway at foreclosure sale; but where such officer is retained in the service of the receivers, and, while so retained, acquired full knowledge of all the facts constituting the nuisance, and the continuation thereof, and is continued in the office in the service of the subsequent purchasers under such conditions as necessarily give rise to the inference that such knowledge remained fixed in his memory, when his employment by the purchaser began, then his knowledge must be deemed the knowledge of the purchaser. *Ib.*

5. VIOLATION OF MUNICIPAL ORDINANCE—PROXIMATE CAUSE OF INJURY.—The violation of a municipal ordinance regulating the rate of speed of railroad trains, while negligence *per se*, affords no ground for an action for damages, unless it is the proximate cause of the injury complained of. *Lowry v. St. Louis & H. Ry. Co.*, 554.

6. NEGLIGENCE—INJURY TO STOCK WITHOUT COLLISION.—In an action for injury to stock by a railroad there may be a recovery without any actual collision, if the action be one at common law, though it is otherwise, when the action is one for double damages under the statute. But there is a wide difference between the case of an actual collision and one where there is none, in respect to the inquiry whether negligence in running the railroad train at an excessive rate of speed in violation of a municipal ordinance was the proximate cause of the injury. *Ib.*

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7. STATION AGENTS.—Though the station agent of a railway company is a special agent, he is presumed as an incident to his position to have authority sufficient to enable him to attend to the safe loading of freight at his station, and, therefore, to contract on the part of the railway company for work on cars which is essential to the safe loading of such freight. *Rosenthal v. St. Louis, I. M. & S. Ry. Co.*, 579.

8. NEGLIGENCE.—In an action against a railway company for personal injuries caused by the derailment of a car, a plaintiff makes out a *prima facie* case by proof that he was injured by the accident, without fault on his part, while traveling as a passenger on the car. *Norton v. St. Louis & H. Ry. Co.*, 642.

9. NEGLIGENCE—ACTION OF INJURED PERSON INDUCED BY DANGER. If a passenger on a railroad car, which has been derailed by the negligence of the railroad company and is in danger of overturning, jumps from the car, while in motion, in order to escape peril, and receives injuries in so doing, it is no defense to his action for such injuries to say that he was unnecessarily alarmed, and that he would have escaped injury, if he had remained on the car. *Dimmitt v. Hannibal & St. J. Ry. Co.*, 654.

10. ——— ACTS OF STRANGERS.—If a duty or service obligatory upon a servant of a railway company be negligently performed by a stranger, the railway company is responsible for damages occasioned to passengers on one of its trains through such negligence, if the stranger performed such duty or service at the request or with the assent of such servant, or in the presence of, and without objection on the part of, such servant. *Ib.*

RATIFICATION.

INSTRUCTION.—An instruction telling the jury that in order to find a ratification they must believe plaintiffs knew of the sale, and that the money paid them arose from said sale, is approved under the facts in this case. *LaFayette County Bank v. Metcalf*, 494.

REALTY. See GROWING TIMBER, 1; LICENSE, 1, 2.

RECOVERY.

PLEADING.—Plaintiff can recover upon no other cause of action than that upon which he declares. *Price v. Chicago, M. & St. P. Ry. Co.*, 189.

REMEDY. See EQUITY, 1; PRINCIPAL AND AGENT, 4.

WARRANTY—REMEDY OF PURCHASER—INSTRUCTIONS.—On a breach of warranty, the purchaser has two remedies, to-wit: He can seasonably return the warranted article and rescind the contract; or he can retain the article and when sued for the purchase money plead a total or partial failure of consideration. The

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action of the court in giving and refusing instructions in this case approved with exception of some harmless error. *Werner v. O'Brien*, 483.

REPLEVIN.

1. JUSTICES OF THE PEACE.—In an action of replevin (instituted in the case at bar before a justice of the peace) the bond requisite to an order of delivery need not be executed by or in the name of the plaintiff, but may be given on behalf of the plaintiff, by and in the name of a third person as principal. *South Mo. Land Co. v. Jeffries*, 360.

2. ———. If, in an action of replevin, instituted before a justice of the peace, the bond given to procure an order of delivery is invalid, that is not ground for the dismissal of the action; but *semble*, that the circuit court might, on an appeal of the cause, require new bond. *Ib.*

3. ——— REPLEVIN—APPEAL.—If an appeal be taken in an action of replevin from a justice of the peace to the circuit court by the party who holds the possession of the property sued for, the appellant has not the right to dismiss his appeal in the circuit court. *Munley v. King*, 531.

4. THE SAME.—If the appellant in such case fail to prosecute his appeal, the circuit court is not bound to affirm the judgment of the justice, but should, after hearing evidence, find the value of the property and render judgment *de novo* in the alternative form prescribed by the statute. *Ib.*

5. THE SAME.—In an action in which the value so found by the circuit court exceeded the penalty of the bond of the appellant, *held* that the appellee should have the opinion between a judgment against the appellant alone for the property or its ascertained value, and a judgment against the appellant and his surety for the property or a sum not exceeding the penalty of the bond. *Ib.*

RES ADJUDICATA. See APPELLATE PRACTICE, 9; FORMER RECOVERY, 1; JUDGMENT, 3, 4, 6.

PRACTICE, APPELLATE.—When a cause has been once appealed and, being remanded, is tried in accordance with the opinion of the appellate court, error cannot be assigned of the rulings of the trial court in so doing, the decision of the appellate court being *res adjudicata*. *Lally v. Cantwell*, 44.

RESCISSION. See ARBITRATION, 1.

RESIGNATION. See CLERKS, 1.

SALES.

1. DELIVERY AS AGAINST CREDITORS OF THE VENDOR.—A mere symbolical delivery of personal property, without any outward or visible change of possession within a reasonable time, such as

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the nature and situation of the property admit of, will not constitute such a change of possession as the statute requires, as against creditors of the vendor, especially when the vendor continues to sustain the same relation to the property in respect to its possession as before the sale. *Dyer v. Balsley*, 559.

2. ———. But the delivery is sufficient to satisfy the requirements of the statute, though the property sold remains in the building in which it was, if such building was until the time of sale the dwelling of the vendor, and if, at said time, the vendor not only delivers to the vendee a bill of parcels together with the key to the building, but also at once removes with his family from such building, and entirely divests himself of the possession thereof, surrendering the same to the vendee, who openly takes the exclusive possession of the premises. *Ib.*

SCHOOLS.

DRAWING WARRANT—LIABILITY OF DIRECTORS.—If the directors limit their drafts for any school year on any fund to the amount thereof derived from all sources for that year, the drawing of a warrant on such fund, when there is no money in it at the exact date of such warrant, and when the directors knew such fact, is not such an unauthorized exercise of power as to make them personally liable for the amount of the warrant so drawn, there being no fraud nor consequent damage or loss. *Jacquemin v. Andrews*, 507.

SCIENTER. See PLEADING, 4; WAIVER, 2.

SELLING LIQUOR. See CRIMINAL LAW, 9, 12, 18; DRUGGISTS, 1, 2.

1. SELLING INTOXICATING LIQUORS—CLUB.—The "make-up" of a club room was in all respects similar to that of an ordinary dramshop; and the dram seeker was required to sign the articles of association and pay an admission fee of twenty-five cents, which clothed him with the privileges of membership and entitled him to buy and drink at the place whatsoever was carried in stock by purchasing a "requisition ticket," paying therefor ten or five cents as he might desire whiskey or beer. *Held*,—

1) The transaction was a sale regardless of the purchaser's relation to the association, whether member or stranger.

(2) The refusal of the trial court to admit the "articles of association," etc., in evidence was harmless to the defense.

8) That the defense was devoid of merit. *State v. Tindall*, 271.

2. CRIMINAL LAW—INDICTMENT FOR SELLING INTOXICATING LIQUORS. An indictment, which charges the defendant with having made several sales of intoxicating liquors at the same time, charges but one offense. *State v. Atkins*, 844.

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STOLEN GOODS.

OBJECT OF PURCHASER OF, NO DEFENSE—INSTRUCTION.—The fact that the purchaser of a stolen machine, who was an agent for the sale of the machine in a given territory, made the purchase with the view of convincing his principal that his territory was being invaded, constitutes no defense to an action against the vendor for the return of the purchase price, and an instruction to that effect is erroneous. *Porth v. Lux*, 162.

STREAMS. See RAILROADS, 2.

SUPREME COURT. See JURISDICTION, 5.

JURISDICTION, APPELLATE—AMOUNT IN CONTROVERSY.—The supreme court has jurisdiction of an appeal taken by a plaintiff from a judgment for the defendant in an action for personal injuries in which the damages are laid in a sum exceeding twenty-five hundred dollars, and there is nothing in the record debarring the plaintiff, if he has a cause of action, from recovering more than said sum. *Willi v. Lucas*, 70.

TENDER.

WAIVER BY UNQUALIFIED REFUSAL. When a person, entitled to the transfer of a patent right as a condition to the liability sued for, absolutely and unqualifiedly refuses to accept such an assignment and denies the liability, a formal tender of such assignment becomes unnecessary, and such liability may thereupon be enforced without such tender. *McDonald v. Wolff*, 302.

TENANTS IN COMMON.

1. ACCOUNTABILITY.—When one of several cotenants, who occupies the whole of the realty held in common, holds a position of trust towards one of his cotenants, as if he be guardian of the person and estate of such cotenant he is accountable to such cotenant for the latter's share of the reasonable rental value of the realty during such occupancy; the liability resting on his obligation to make his ward's property productive. *In re Final Settlement of Tyler*, 378.

2. JUDGMENT—RES ADJUDICATA.—When several persons acquire realty as tenants in common under a will, and one of the tenants in common is both executrix of the will, and guardian of the person and estate of one of her cotenants, a final settlement made by her as such executrix, in which she does not charge herself with the rental value of the realty during her occupancy thereof, is not *res adjudicata* as to a claim of her ward for a share of such rental value, for which she is liable in her capacity as guardian owing to her obligation, as such, to render her ward's estate productive. *Ib.*

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3. THE SAME.—Neither will the judgment in a suit for the partition of the realty, in which no claim for such rental value was made, debar the ward from claiming her share of such rental value from her guardian, though she and her guardian were parties to the suit, and she was of age at the time of the partition. *Ib.*

TRESPASS.

NOTICE OF PLAINTIFF'S RIGHT—LESSOR AND LESSEE—DEFENDANT'S CONTRACTOR. W., the owner, in November, by a mere parol lease, rented his farm for a year to plaintiff, who was to go into possession in March following. In January or February following, this contract was so modified as to make plaintiff an allowance for a right-of-way strip through the farm about to be sold by W. to the defendant railway company. On January 12, the defendant contracted the construction of roadbed to MacR., whose sub-contractors cleared the right of way in February, and on March 4 began the grading, and completed it in the succeeding October. Said contractors threw down the fences, whereby cattle entered upon the fields cultivated by plaintiff as tenant under his renting contract. For such damage so occasioned plaintiff brought trespass against the defendant railway. *Held*—

(1) That, though defendant might be held as a cotrespasser with the contractor MacR., if at the time of making its contract with him, it could be charged with notice of the rights of plaintiff in the land (if any), yet the law does not charge one with notice of such a lease, and prior to taking possession a tenant under a verbal lease has no estate in lands.

(2) That those engaged in the construction of the road were in no sense the servants of the defendant.

(3) That the provisions of the contract that the work should be performed under the supervision of defendant's chief engineer, at whose directions objectionable employes should be discharged, do not have the effect to make the contractor and his employes the servants of the defendant. *McKinley v. Chicago, S. F. & C. Ry. Co.*, 449.

VARIANCE.

PLEADING.—When the petition in an action for the recovery of benefits, in the nature of insurance, alleges an unconditional contract to pay such benefits while the evidence establishes only a contract to pay on the performance of certain conditions precedent, this difference constitutes only a variance, and such variance is not material when it could not have misled the defendant. *Heffernan v. Supreme Council Amer. Legion of Honor*, 605.

VENUE. See PRACTICE, TRIAL, 8, 9.

VERDICT. See DAMAGES, 1.

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WARRANTY.

1. CONSISTENT DEFENSES.—In an action for the purchase price of a machine, a defense upon a breach of the warranty of the machine and another defense upon the fact that the machine was bought for specific purposes made known at the time to the plaintiff, and that it proved utterly worthless for that purpose, are consistent defenses, and the last named is not to be confounded with an implied warranty. *Keystone Implement Co. v. Leonard*, 477.

2. DEFENSE—NO RETURN OF WORTHLESS MACHINE.—That a machine was of no value for the purpose for which it was purchased is a valid defense as showing a failure of consideration and this whether the defendant offered to return the machine or not, or failed to notify plaintiff of its worthlessness. But where the article bought is of any value for any other purpose, then the vendee cannot retain it and interpose the defense of total failure of consideration. *Ib.*

3. RETURN OF ARTICLE—REASONABLE TIME.—A vendee is entitled to a reasonable time in which to test the machine and determine whether it fills the requirements of the warranty, and the retention of it for that purpose during that time could not be *held* an acceptance, and the vendor cannot be heard to complain of delays in returning the article occasioned by himself. *Ib.*

4. REMEDY OF PURCHASER—INSTRUCTIONS.—On a breach of a warranty, the purchaser has two remedies, to-wit: He can seasonably return the warranted article and rescind the contract; or he can retain the article and when sued for the purchase money plead a total or partial failure of consideration. The action of the court in giving and refusing instructions in this case approved with exception of some harmless error. *Werner v. O'Brien*, 483.

5. EVIDENCE—EXPERT WITNESS—LAPSE OF TIME.—Where expert witnesses testify that tobacco of good quality did not deteriorate by age, but generally grew better, it is not error to permit them to testify as to the consideration of said tobacco on an examination made more than a year after the sale in question. *Ib.*

6. DAMAGES—INSTRUCTION—HARMLESS ERROR.—While in this case the court's instruction did not, as it should have done, limit defendant's damages, still, as the finding of the jury was not beyond the amount of the note sued upon, the error was harmless to the plaintiff. *Ib.*

WAIVER. See CONTRACT, 10; PLEADING, 8.

1. PLEADING—REPLY.—When a petition upon a written contract alleges specific performance of the conditions and obligations on the part of plaintiff, there can be no recovery upon a waiver not

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pleaded; nor can such waiver, on denial of performance in the answer be set up in the reply as the denial makes the issue complete, and the waiver is inconsistent with the allegation of performance in the petition, nor can such allegation in the reply cure the defect of the petition. *Mohney v. Reed*, 99.

2. PLEADING SCIENTER.—In order to constitute a waiver there must be knowledge of the true situation, and, in pleading a waiver, there should be an allegation that, knowing the contract had not been performed. the defendant accepted, etc. *Ib.*

3. BUILDING CONTRACT—ACCEPTANCE—KNOWLEDGE.—In building contracts, where the house is built upon the property of him who has it built, acceptance and use of the work, knowing it was not done in accordance with the contract, is not a waiver. *Ib.*

4. INSURANCE—ESTOPPEL.—There should be something in the conduct of the insurer in the nature of an estoppel in order to constitute a waiver of a condition in an insurance policy. *Grigsby v. German Ins. Co.*, 276.

5. TENDER—WAIVER BY UNQUALIFIED REFUSAL.—When a person, entitled to the transfer of a patent right as a condition to the liability sued for, absolutely and unqualifiedly refuses to accept such an assignment, and denies the liability, a formal tender of such assignment becomes unnecessary, and such liability may thereupon be enforced without such tender. *MacDonald v. Wolff*, 302.

6. PLEADING—WAIVER OF PERFORMANCE V. WAIVER OF DAMAGES. The fact that the reply only pleads a waiver of damages, and not a waiver of performances (if a fact), can make no difference, as the establishment of either will suffice. *Ib.*

7. INSTRUCTION.—An instruction telling the jury in effect, even though they should find the appraiser had prejudged the cause, yet, if they further find that defendant, previously to the hearing, knew of such judgment and suffered the hearing to proceed, they would find for the plaintiffs, is all, if not more, than was warranted in this case. *Leitch v. Miller*, 180.

8. CARRIERS—NOTICE OF DAMAGE.—A contract of shipment required that the plaintiff, in case of damage in transportation, would, in twenty-four hours after arriving at the point of destination, give notice thereof in writing verified by affidavit to some general officer of the defendant, etc. The plaintiff within such time handed an unverified letter containing an account of his loss to defendant's general freight agent, who received the same, made no objection thereto, either as to form or substance, and promised to look up and adjust the claims. *Held*, this was sufficient notice and a waiver of the requirement that it should be sworn to. *Hess v. Mo. Pac. Ry. Co.*, 202.

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WASTE.

1. Rule as to cutting timber.—In this country where timber in many places is a hindrance to the enjoyment of the estate, whether it be for life or in fee, the law is, that cutting for the purpose of cultivation (if it do not lessen the value of the inheritance) is a privilege following a tenancy for life, when it is necessary for the proper and reasonable enjoyment of the estate and as long as the tenant only acts in so doing in conformity to good husbandry, regard being had to the situation of the country and the comparative value of the timber; and, therefore, cutting timber not for firewood, repairs to the premises or for cultivation, but for converting it into railroad ties for the market, is waste. *Davis v. Clark*. 515.

2. Negative averment—defense.—The statute declaring that if a tenant for life shall commit waste "without special license in writing so to do, he shall be subject to civil action," etc., does not impose upon plaintiff the burden of proving that defendant had not the special license, but is matter of defense which must be established by the defendant. *Ib.*

WITNESSES.

1. Effect of death of a party to a contract.—Notwithstanding the death of a party to a contract, the other party is competent to testify in regard to it, when he is neither a party of record nor in interest to the suit in which he is called to testify, and in no sense testifies in his own favor. *Ford v. O'Donnell*, 51.

2. Competency.—In an action upon a contract, brought by the assignee of one of the contracting parties, who is dead, against the other contracting parties, such other contracting parties are not competent witnesses in relation to the contract, owing to the death of the one party. *LaFayette Building Ass'n v. Kleinhoffer*, 388.

3. ———. The deposition of one of several contracting parties, though in relation to the matter of contract, is not rendered incompetent as evidence by the death of another of the contracting parties after the taking of the deposition. *Ib.*

WRIT OF PROHIBITION. See Prohibition.

RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

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RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the

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bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The Clerks of the several circuit Courts and other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*) "*Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;*" and if any pleading be amended, the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain

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from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the Court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or

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defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless, for good cause shown, the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or,

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at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the Court thereupon and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed, and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question, decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of

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itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the Court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial Court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM.—A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given.

Attest:

F. C. FARR, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing, signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

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RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the Clerk of the trial Court to send up a complete transcript, when the transcript of the record is formally insufficient.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court

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of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial Court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERKS IN MAKING OUT TRANSCRIPTS. The Clerks of the several circuit Courts and other Courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court,

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set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;*" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the clerk of the court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the

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cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

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RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at its discretion, continue or reset the cause, on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the Court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the

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appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

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RULE 25.—APPEARANCE OF COUNSEL. The Counsel who represented the parties in the trial Court, in any cause coming to this Court, will be held to represent the same parties respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days, before the first day of the term to which the appeal or writ of error is returnable; and, if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the Clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

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